113-711

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 525.

THE UNITED STATES, INTERVENOR, APPELLANT,

vs.

THE INDIANAPOLIS AND SAINT LOUIS RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

**FILED JULY 6, 1883.**

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1 Pleas of the circuit court of the United States for the seventh judicial circuit and district of Indiana, begun and holden at the United States court-house in the city of Indianapolis, in said district, on the first Tuesday of May, in the year of our Lord one thousand eight hundred and eighty-three, before the honorable John M. Harlan, associate justice of the Supreme Court of the United States, and the honorable William A. Woods, judge of the district court of the United States for the district of Indiana, and ex officio judge of said circuit court.

HINMAN B. HURLBUT, TRUSTEE,
*v.*
THE INDIANAPOLIS AND ST. LOUIS RAILROAD Company. } 7418. Chancery.

Be it remembered that heretofore, to wit, at the May term of said court on the 19th day of July, A. D. 1882, before the honorable Walter Q. Gresham, judge of the district court of the United States for the district of Indiana, and ex officio judge of said circuit court, the following proceedings in the above-entitled cause were had, to wit:

2 Comes now Charles L. Holstein, esq., the attorney of the United States, and in the name and on behalf of the United States files an intervening petition herein, in the words and figures following, to wit:

To the honorable the judges of the United States circuit court for the district of Indiana:

Now comes Charles L. Holstein, United States district attorney within and for said district, for and on behalf of the United States, and respectfully showeth:

That the said defendant, The Indianapolis and St. Louis Railroad Company, became, on the 1st day of January, A. D. 1870, and is still, indebted unto the United States in the sum of two thousand six hundred and fifty dollars and eighty cents ($2,650.80), as and for certain internal-revenue taxes, duly assessed upon the earnings, bonds, and interest coupons of the said railroad company, and also in the further sum of dol-
3 lars, as and for interest on said sum of $2,650.80, from the said 1st day of January, A. D. 1870, for which said sums suit is now pending in this court, the same being cause No. 7066 U. S. circuit court.

That by virtue of the statutes of the United States in such case made and provided, the said United States are entitled to be first paid, before the said Hinman B. Hurlbut, trustee, and any and all other creditors of said railroad company.

Wherefore, the said attorney respectfully prays, for and on behalf of the said United States, that, if the said railroad be sold pursuant to the order of this honorable court, from the proceeds of such sale the master be ordered and directed to pay into this court the sum of $2,650.80, and a further sum sufficient in amount to cover the interest claimed and the costs in the said suit of the United States, said sum so paid to abide the result in the said cause No. 7066, and to be thereupon appropriated to the satisfaction of the judgment in favor of the United States in said cause, if any there be.

4 PAR. 2. And the said United States by Charles L. Holstein, the attorney of the United States, in and for the district of Indiana, for a second paragraph, herein further respectfully showeth:

That certain interest coupons of the first-mortgage bonds, series "A," of the said Indianapolis and St. Louis Railroad Company, in the amount of two thousand two hundred and ninety dollars and thirty-three cents ($2,290.33), were payable and paid by the said company on the first day of January, A. D. 1870, upon which the said company became indebted, and was on the said first day of January, A. D. 1870, indebted to the said United States, for and on account of the internal-revenue tax of five per centum, imposed thereon by law, in the sum of one hundred and fourteen dollars and fifty-two cents ($114.52).

That certain other interest coupons of the first-mortgage bonds, series "A," of the said company, in the amount of nineteen thousand four hundred and twenty-five dollars ($19,425.00), were payable and paid by said company on the first day of July, A. D. 1870, upon which the de-
5 fendant became and was indebted to the United States, for and on account of the internal-revenue tax of five per centum, imposed thereon by law, in the further sum of nine hundred and seventy-one dollars and twenty-five cents ($971.25).

That certain other interest coupons of the first-mortgage bonds, series "A," of the defendant, in the amount of twenty-three thousand three hundred and forty-five dollars ($23,345), were payable and paid by said company on the first day of January, A. D. 1871, upon which said company became and was indebted to the said United States, for and on account of the internal-revenue tax of five per centum, that is to say, for the said tax on said coupons for the month of July, A. D. 1870, imposed thereon by law, in the further sum of one hundred and ninety-four dollars and fifty-four cents ($194.54).

That upon the same interest coupons last aforesaid, due and paid as aforesaid, and in amount as aforesaid, the said company became and was, on the said first day of January, A. D. 1871, indebted to the said United States, for and on account of the internal-revenue tax, at the rate of two and one-half per centum for the five months of August, September,
6 October, November, and December, in the year A. D. 1870, in the further sum of *of* four hundred and eighty-six dollars and thirty-five cents ($486.35).

That certain other interest coupons of the first-mortgage bonds, series "A," of the said company, in the amount of twenty-three thousand three hundred and forty-five dollars, were payable and paid by the said company on the first day of July, A. D. 1871, upon which the said company became and was indebted to the United States, for and on account of the internal-revenue tax of two and one-half per centum, imposed thereon by law, in the further sum of five hundred and eighty-three dollars and sixty-two cents ($583.62).

That certain other interest coupons of the first-mortgage bonds, of series "A," of said company, in the amount of twenty-three thousand three hundred and forty-five dollars ($23,345), were payable and paid by the said company on the first day of January, A. D. 187?, and which said coupons and interest were payable and paid by the said company from and out of the earnings and income of said company, earned and

7 made by the said defendant prior to the first day of January, A. D. 1872, and subsequent to the act of July 14, 1870, imposing a tax on interest and dividends payable by railroad companies, and upon said payment of said coupons the said defendant became and was on the said first day of January, A. D. 1872, indebted to the United States for and on account of the internal-revenue tax of two and one-half per centum, imposed thereon by law, in the further sum of five hundred and eighty-three dollars and sixty-two cents ($583.62).

That certain other interest coupons of the first-mortgage bonds, series "B," of the said company, in the amount of twenty-three thousand three hundred and forty-five dollars, were payable and paid by said company on the first day of September, A. D. 1870, upon which the said defendant became and was on said day indebted to said United States, for and on account of the internal-revenue tax of five per centum, imposed thereon by law, for five months immediately prior but one thereto, in the fur-

8 ther sum of nine hundred and seventy-two dollars and seventy cents ($972.70), and for the further sum of ninety-seven dollars and twenty-seven cents ($97.27) for the internal-revenue tax imposed thereon by law for the additional period of one month, for which the said tax was at the rate of two and one-half per centum.

That certain other interest coupons of the first-mortgage bonds, series "B," of said company, in amount the sum of twenty-three thousand three hundred and forty-five dollars ($23,345), were payable and paid by said company on the first day of March, A. D. 1871, upon which the said company became and was, on said day, indebted to the United States in the further sum of five hundred and eighty-three dollars and sixty-two cents, for and on account of the internal-revenue tax, imposed thereon by law at the rate of two and one-half percentum.

That certain other interest coupons of the first-mortgage bonds, series "B," of the said company, in amount the sum of twenty-three thousand three hundred and forty-five dollars ($23,345), were payable and paid by

9 the said company on the first day of September, A. D. 1871, upon which the said company became and was, on said Sept. 1st, 1871, indebted to the United States in the further sum of five hundred and eighty-three dollars and sixty-two cents ($583.62), for and on account of the certain internal-revenue tax, at the rate of two and one-half per centum, imposed thereon by law.

That certain other interest coupons of the first-mortgage bonds, series "C," of the said company, in amount the sum of four thousand two hundred dollars ($4,200), were payable and paid by the said company on the first day of May, A. D. 1870, upon which the said defendant became and was, on said May 1, 1870, indebted to said United States in the further sum of two hundred and ten dollars ($210), for and on account of the internal-revenue tax, at the rate of five per centum, imposed thereon by law.

That certain other interest coupons of the first-mortgage bonds, series "C," of said company, in amount the sum of twenty-three thousand

10 three hundred and ten dollars, were payable and paid by said company on the first day of November, A. D. 1870, upon which said company on said November 1, 1870, became and was indebted unto the United States in the further sum of five hundred and eighty-two dollars and seventy-five cents ($582.75), for and on account of the internal-reve-

nue tax, imposed thereon by law, for three months, at the rate of five per centum, and the further sum of two hundred and ninety-one dollars and thirty-eight cents ($291.38), for and on account of the internal-revenue tax, imposed thereon by law, for three months, at the rate of two and one-half per centum.

That certain other interest coupons of the first-mortgage bonds, series "C," of said company, in amount the sum of twenty-three thousand three hundred and ten dollars ($23,310), were payable and paid by said company on the first day of May, A. D. 1871, upon which said company became and was, on said May 1, 1871, indebted to the United States in the further sum of five hundred and eighty-two dollars and seventy-five cents, for and on account of the internal-revenue tax, at the rate of two and one-half per centum, imposed thereon by law.

That certain other interest coupons of the first-mortgage bonds of series "C," of said company, in amount the sum of twenty-three thousand three hundred and ten ($23,310) dollars, were payable and paid by said company on the first day of November, A. D. 1871, upon which the said company became and was, on said November 1, 1871, indebted unto the United States in the further sum of five hundred and eighty-two dollars and seventy-five cents ($582.75), for and on account of the internal-revenue tax of two and one-half per centum imposed thereon by law.

That certain other interest coupons of the second-mortgage bonds of said company, in amount the sum of fourteen thousand one hundred and thirty-nine dollars and fifty cents ($14,139.50), were payable and paid by the said defendant on the first day of April A. D., 1871, upon which said company became and was, on said April 1, 1871, indebted unto the United States in the further sum of three hundred and fifty three dollars and forty-nine cents ($353.49), for and on account of the internal-revenue tax, at the rate of two and one-half per centum, imposed thereon by law.

That certain other interest coupons of the second-mortgage bonds of said company, in amount the sum of thirty-five thousand dollars ($35,000), were payable and paid by said company on the first day of October, A. D. 1871, upon which said company on said October 1st, 1871, became and was indebted to the United States in the further sum of eight hundred and seventy-five ($875) dollars, for and on account of the internal-revenue tax of two and one-half per centum imposed thereon by law.

That certain other interest coupons of the equipment bonds of the said company, in amount the sum of four thousand and forty dollars ($4,040), were payable and paid by said company on the first day of January, A. D. 1872, which said coupons and interest were payable and paid by the said company from, by, and out of the earnings and income of said company prior to the said first day of January, A. D. 1872, and subsequent to the act of June 14th, 1870, imposing a tax on interest and dividends payable by railroad companies, upon which said interest coupons the said company became and was, on said January 1, 1872, indebted unto the United States in the further sum of one hundred and one dollars ($101), for and on account of the internal-revenue tax of two and one-half per centum imposed thereon by law.

And your orator further alleges that the said several sums of money in which the said Indianapolis and St. Louis Railroad Company was and is still indebted to the United States, which said sums amount in the aggre-

gate to eight thousand seven hundred and fifty dollars and twenty-three cents ($8,750.23), still remain due and unpaid, excepting the sum of six thousand and ninety-nine dollars and forty-three cents ($6,099.43), which last-named sum said company paid on the 17th day of January, A. D. 1874, still leaving now due and wholly unpaid the sum of two thousand six hundred and fifty dollars and eighty cents ($2,650.80), with interest thereon.

And your orator further alleges that the said company, by rea-
14 son of its making default in payment of said several sums of taxes in manner and form and at the times prescribed by law, that is to say, at the times when the said interest coupons were payable by their tenor respectively, became and is liable and indebted to the United States in the further sum of one thousand dollars ($1,000) as a forfeit and penalty under and by virtue of the laws of the United States in such case made, making in all the sum of three thousand six hundred and fifty dollars and eighty cents, with interest yet to pay; the said sum of money or any part thereof, although thereunto often requested, the said company wholly neglects and refuses, wherefore this bill is filed.

And your orator further alleges that as and when the said several sums of internal-revenue tax hereinbefore set forth became due and payable, respectively, the said company deducted and retained in its possession from the amounts due the respective payees of the said coupons for and on account of said coupons a sum equal to the internal-revenue tax upon said coupons respectively, and now holds said sum so deducted for the
15 payment of the said taxes in trust for the use of the United States, but to pay the same unto the United States, although often thereunto demanded, wholly neglects and refuses; wherefore your orator says that the United States are entitled to a priority in payment of their said claim over all other debts of the said company.

And your orator further alleges that the said company is insolvent; that on the 20th day of May, A. D. 1882, one John H. Devereaux, esq., was, by order of this honorable court, appointed receiver of said company, and that the estate and assets of said company in the hands of said receiver are insufficient to pay all the debts due from said company.

Wherefore your orator says that by virtue of the laws of the United States in such case made and provided the United States are entitled to be first paid before any and all other creditors of the said company, and the said debt of the United States is a preferred claim and lien upon all assets, property, rights, or interests of the said company, paramount to all other claims or liens thereon of whatsoever character.

16 Wherefore your orator prays that the said claim of the United States be allowed against the said railroad company and all parties intervening herein for their interests, and that the said receiver of the said railroad company be ordered to pay said claim with interest, penalties, and costs as aforesaid, according to its priority aforesaid, before the payment of any other claim whatever in this cause, and before any distribution whatever be made of the funds in the hands of said receiver, or of any other funds of said railroad company whatever in the custody or under the control of this honorable court, or any part thereof, and they will ever pray.

CHARLES L. HOLSTEIN,
*U. S. Attorney.*

And thereupon it is ordered, that the parties herein, plaintiff and defendant, be served with notice of the pendency of said petition, and that they and each of them show cause why the prayer of said petition should not be granted.

And it is further ordered, that a certified copy of this order be issued by the clerk to the marshal, and that the marshal serve the same
17 on said parties and each of them, and that said claim be, and the same is hereby, referred to the master for hearing, determination, and allowance.

And afterwards, to wit, at the November term of said court on the 26th day of December, A. D. 1882, before honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant by John T. Dye, its solicitor, and files its answer to the intervening petition of the United States in the words following, to wit:

In the matter of the intervening petition of the United States.

*Answer of the Defendant.*

1. The Indianapolis and St. Louis Railroad Company for answer to the petition of the United States, as to the first paragraph thereof, denies each and every material allegation therein set forth.

2. Further answering said petition as to the second paragraph thereof, the defendant The Indianapolis and St. Louis Railroad Company, says that it has been at all times ready and willing to pay to plaintiff all sums due plaintiff on account of internal-revenue taxes, and it has paid plaint-
18 iff all sums claimed by plaintiff's agent at the time of making such payment, to wit, $6,099.43 on the 17th day of January, 1874, and that said payment was in full of all sums due plaintiff on account of the coupons which were payable and paid by the defendant, as follows:

*On first mortgage bonds, series A.*

| | | |
|---|---|---|
| Jan'y 1, 1870. | $2,290.33, @ 5 % | 114 52 |
| July 1, 1870. | 19,425.00, @ 5 % | 971 25 |
| Jan'y 1, 1871. | 23,345.00, @ 5 % 1 mo | 194 54 |
| " 1, 1871. | 23,345.00, @ 2½ % 5 mo | 486 35 |
| July 1, 1871. | 23,345.00, @ 2½ % | 583 62 |
| | | $2,350 28 |

*On first mortgage bond, series B.*

| | | |
|---|---|---|
| March 1, 1870. | $23,345.00, @ 2½ % | 583 62 |
| Sep't. 1, 1871. | 23,345.00, @ 2½ % | 583 62 |
| | | $1,167 24 |

*On first mortgage bonds, series C.*

| | | |
|---|---|---|
| May 1, 1870. | $4,200.00, @ 5 % | 210 00 |
| May 1, 1871. | 23,310.00, @ 2½ % | 582 75 |
| Nov. 1, 1871. | 23,310.00, @ 2½ % | 582 75 |
| | | $1,375 50 |

*On second mortgage bonds.*

| | | |
|---|---|---|
| April 1, 1871. | $14,139.50, @ 2½ % | $353 49 |
| Oct. 1, 1871. | $35,000.00, @ 2½ % | 875 00 |
| | | $1,228 49 |

19 *Recapitulation.*

| | | |
|---|---|---|
| On first-mortgage bonds, | series A | 2,350 28 |
| " " " " | series B | 1,167 24 |
| " " " " | series C | 1,375 50 |
| " second " " | | 1,228 49 |
| | | $6,121 51 |

except the sum of $22.08, the non-payment of which resulted from some error in computation at the time of making the payment, and which sum the defendant now brings into court and tenders to plaintiff.

As to the remaining items of plaintiff's account, for taxes on interest or coupons payable and paid after August 1, 1870, and prior to January 1, 1871, and after December 31, 1871, as follows, to wit:

*On first-mortgage bonds, series A.*

| | | |
|---|---|---|
| Jan'y 1, 1872. | $23,345.00 @ 2½ % | 583 62 |

*On first-mortgage bonds, series B.*

| | | |
|---|---|---|
| Sept. 1, 1870. | $23,345.00 @ 5 % 5 mo | 972 70 |
| " 1, 1870. | $23,345.00 @ 2½ % 1 mo | 97 27 |
| | | $1,069 97 |

*On first-mortgage bonds, series C.*

| | | |
|---|---|---|
| Nov. 1, 1870. | $23,310, @ 5 %, 3 mo | 582 75 |
| " 1, 1870. | $23,310, @ 2½ %, 4 mo | 291 38 |
| | | 874 13 |

*On equipment bonds.*

| | | |
|---|---|---|
| Jan'y 1, 1872. | $4,040.00 @ 2½ % | 101 00 |

20 *Recapitulation.*

| | | |
|---|---|---|
| On first-mortgage bonds, | series A | 583 62 |
| " " " " | series B | 1,069 97 |
| " " " " | series C | 874 13 |
| On equipment bonds | | 101 00 |
| | | $2,628 72 |

the respondent says that the interest on coupons upon which the tax is claimed in these items was neither payable nor paid in 1871, and that the

tax was not levyable or collectible on the interest as it accrued, but when it was paid; and that under the law such tax can only be levied and collected for and during the year 1871, and upon coupons or interest paid or payable during that year; and that the interest or coupons being in good faith not payable in the year 1871, the tax set forth in the foregoing items is not demandable either in whole or in part.

Wherefore the defendant prays judgment for costs, and all proper relief.

JNO. T. DYE,
*For Defendant.*

And on the same day, to wit, the 26th day of December, 1882,
21 the following further proceeding, in the above-entitled cause were had, to wit:

And now comes said intervening petitioner by Charles L. Holstein, esq., attorney prosecuting the pleas of the United States, and files its demurrer to said answer in the words following, to wit:

In the matter of the petition of the United States.

*Demurrer to answer to second paragraph.*

Comes now the plaintiff by Charles L. Holstein, the attorney of the the United States, in and for the district of Indiana. and demurs to the said defendant's answer to the second paragraph of the plaintiff's petition, and for cause says that said answer does not state facts sufficient to constitute a defense to the plaintiff's second paragraph of the petition herein to which said answer is directed.

Wherefore the plaintiff prays judgment.

CHAS. L. HOLSTEIN,
*U. S. Attorney.*

And afterwards, to wit, at the November term of said court, on the first day of March, A. D. 1883, before honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

22 Comes now William P. Fishback, master in chancery, and files his report on the claim of the United States, in the words following, to wit:

23 *Intervening petition of United States.*

To the honorable court:

By the act of Congress, June 30, 1864, railroad companies, indebted for money upon which interest was stipulated to be paid in one or more years after date, were required to report and pay to the proper revenue collector "a duty of five per centum on the amount of all such interest or coupons * * * whenever the same shall be payable." It was provided that the company paying this duty might reserve it from the interest owing, and that pro tanto it should be a discharge of its obligation to pay the interest to the holder of the company's obligation. Upon the failure of the company to make the proper return and pay the tax, a forfeture of $1,000.00 was imposed. (See §. 122, 13 Stat. at L., p. 284.)

July 13, 1866, an act was passed amendatory to § 122 of the foregoing act, but not changing in a way to effect the question presented here. (See § 9, 14 Stat. at L., p. 738.)

July 14, 1870, an act was passed amending the two statutes above mentioned.

Section 17 of the act of July 14, 1870, provides that § § 120, 121,
24 122, 123 of the act of June 30, 1864, entitled "An act to provide internal revenue, etc., * * * * shall be construed to impose taxes therein mentioned to the first day of August, 1870, but after that date no further tax shall be levied or assessed under said sections. And all acts or parts of acts relating to taxes herein are repealed, and that all the provisions of said acts shall continue in full force for levying and collecting of taxes properly assessed or liable to be assessed, or accruing under the provision of former acts; or drawbacks, the right to which has already accrued, or which hereafter may accrue under said acts for maintaining and continuing liens, fines, etc., incurred under and by virtue thereof. * * * And this act shall not affect any act done or right accrued or penalty incurred under former acts, but every such act is hereby saved." (16th St. at L., p. 261.)

Ssection 15 of the same act provides:

"That there shall be levied and collected for and during the year 1871 a tax of two and a half per centum on the amount of all interest or coupons paid on bonds or other evidences of debt issued and payable
25 in one or more years after date by any of the corporations hereinafter enumerated, and on account of dividends, earnings, moneys, or gains hereafter declared by any * * * railroad company * * * whenever and wherever the same shall be payable, and to whatsoever person the same may be due," etc.

Section 15 of the same act provides also for the deduction and withholding by the railroad company of the am't of tax from the interest, dividends, etc., owing to the holders of the bonds, coupons, etc. Section 16 provides for returns to be made by the railroad co., & a penalty of $1,000 for failure to make such returns & payment of the tax.

The principle question in this case is whether the tax of two and a half per centum should be imposed and collected on interest coupons falling due during the months of August, September, October, November, and December, 1870.

It is admitted that the first rulings of the Revenue Dep't were to the effect that the tax could not be collected for those months. Afterwards,
26 by advice and direction of the Attorney-General, the rulings were changed and the right was asserted in behalf of the Gov't. These different rulings are set out iu the elaborate brief of the district attorney. Since May, 1871, the Revenue Dep't have continuously asserted the claim, although it is alleged in the answer of the railroad co. that one Green, an agent of the Dep't, settled with the co. in 1874, and made no such claim.

The Supreme Court have said, in a decision giving construction to this statute, that "the ambiguous terms of the statute prevent the possibility of a satisfactory solution of the question presented. We are inclined to adopt the construction practically placed upon it by the administrative department of the Government," etc. (Blake vs. National Banks, 23 Wal., 307. Justices Davis, Strong, & Bradley dissented.)

In reading the conclusion to which the majority of the court came, recourse was had to the House and Senate journals of Congress, from which it plainly appears that there was no intent on the part of
27 Congress to leave a hiatus of five months in the year 1870, during which the imposition of such tax was to be suspended.

The statement of that case by the reporter shows that there were other cases with the one decided involving the question, "Whether additions to surplus and payments of interest made by corporations during the five months above mentioned * * * were liable to be charged with the said tax."

In the concluding sentence of the opinion of the court, delivered by Justice Hunt, the court say, "The tax cannot be levied or collected until 1871, but it may be imposed upon all dividends, additions, or payments of interest made or declared after the passage of the act of July 17, 1870."

I report and find that there is due to the Gov't two and one-half per centum of the am't of coupons paid during the last five months of the year 1870, which per centum amounts to $1,944.10. To this should be added the penalty of $1,000 unless the court should consider that the
28 accounting alleged to have been had with one Green, an agent of the Revenue Dep't, in which no claim for the tax in dispute was made, is sufficient to exonerate the railroad co. from such penalty.

The fact appears or was conceded that the co. reserved the 2½ per centum from the interest which was payable to holders of coupons and bonds, during the period in dispute, and still retains it.

As the sum of $684.82 being for tax on interest falling due Jan. 1, 1872, the master reports that there is no liability on the part of the R. road Co. to pay the same. (See R. R. Co. vs. U. S., 101 U. S. Rep., 543.)

Respectfully submitted.

W. P. FISHBACK,
*Master.*

29 And afterwards, to wit, at the November term of said court, on the 9th day of March, A. D. 1883, before the honorable Walter Q. Gresham, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now Charles L. Holstein, esq., attorney prosecuting the pleas of the United States, and files his exceptions to the master's report on the claim of the United States, in the words following, to wit:

In the the matter of the claim of the United States herein for certain internal-revenue taxes.

*Exceptions of the United States to the master's report.*

Exceptions taken by the United States to the report made herein by William P. Fishback, esq., the master herein, to whom this cause and the claim of the United States herein for certain internal-revenue tax were referred by the order of this court, which report bears date and was filed on the first day of March, A. D. 1883.

*First exception.*—For that whereas the master, in his report herein, reports and finds, "as to the claim for $684.62, being for tax on interest

falling due Jan. 1, 1872, the master reports that there is no liability on the part of the *of the* R road Co. to pay the same (see R. R. Co. vs. U. S. 101, U. S. Rep., 543)," the United States except thereto, because
30 the said finding is contrary to the facts, proofs, and evidence herein.

*Second exception.*—For that whereas the master, in his report and findings herein, disallows the claim of the United States herein for taxes on interest coupons paid and payable by the railroad co. on the first of Jan'y, 1872, in the sum of $684.62, the United States excepts for the reasons that according to the law and the evidence the same should have been allowed as claimed by the United States, because the same were paid out of the earnings of the R. R. Co. earned prior to Jan'y 1st, 1872.

*Third exception.*—For that whereas the master, in his report, does not in express terms recognize the priority of the United States according to the law in that behalf made and provided, the United States excepts, for the reason that the United States, according to the law, is entitled to priority of payment, and the debt due the United States is entitled first to be fully paid and satisfied under the law (sec. 3466, R. S.), and because the R. R. Co. has reserved the said taxes for the use of the United States, and so still holds the same in trust for the United States.

Wherefore, in respect to the matters stated in the exceptions supra,
31 the United States pray that the said report of the master be disaffirmed, and that said exceptions be allowed.

CHARLES L. HOLSTEIN,
*U. S. Dist. Att'y.*

And afterwards, to wit, in recess of said court, on the 4th day of April, A. D. 1883, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by John T. Dye, its solicitor, and files its exceptions to the master's report on the intervening petition of the United States, in the words following, to wit:

Exceptions of the Indianapolis and St. Louis Railroad Company to the report of William P. Fishback, master, upon the intervening petition of the United States of America.

The defendant, The Indianapolis and St. Louis Railroad Company, objects to the said report of said master, dated March 1st, 1883, and filed on said day, and excepts thereto, and the findings thereof, as follows:

First. For that whereas the said master found and reported in favor of the petitioner in the sum of $1,944.10, whereas he should have found for the defendant, and so reported.

Second. For that the said master found and reported that there was due to the petitioner, as a tax properly imposed and charged, the sum of $1,944.10, being 2½ % of the amount of interest coupons fall-
32 ing due during the months of August, September, October, November, and December, 1870; whereas he should have found that the said tax of 2½ % could not, under the law, be imposed and charged upon coupons, payable and paid in good faith, in the said months of August, September, October, November, and December, 1870, and that the defendant was not liable to pay the same, and should have so reported.

Third. For that the said master failed to find and report, as shown by the evidence, that this defendant did, in 1874, make a full settlement of all claims of petitioner theretofore accrued, with one Green, an authorized agent of petitioner, and did thereafter pay to petitioner the amount demanded by such agent; said settlement having been made after a full and complete examination of the books of defendant.

And the said report, upon the points above set out, being contrary to law and to the evidence, and not supported by the evidence, therefore this defendant objects and excepts thereto, and prays that the said report upon the points named be rejected and disapproved, and the judgment therein be disallowed, and the exceptions of this defendant to the same be allowed and sustained.

INDIANAPOLIS & ST. LOUIS RAILROAD CO.,
By JOHN T. DYE, *Attorney.*

33 And afterwards, to wit: At the May term of said court, on the 12th day of May, A. D. 1883, before the honorable John M. Harlan, one of the associate justices of the Supreme Court of the United States, and the honorable William A. Woods, judge of the district court of the United States for the district of Indiana, and ex-officio judge of said circuit court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the United States by Charles L. Holstein, esq., their attorney in and for said district, and also the said Indianapolis and St. Louis Railroad Company and John H. Devereaux, receiver thereof, by John T. Dye, esq., their solicitor, in the matter of the said claim of the United States herein for certain internal-revenue taxes on certain interest coupons of the bonds of the said railroad company as set forth in said claim.

And the said cause—that is to say the said claim of the United States—comes on for hearing upon the pleadings herein, and the report of Wm. P. Fishback, esq., the master of this court, to whom this claim was heretofore duly referred, and also upon the several exceptions to said report filed respectively by the said railroad company and by the United States.

34 And the said cause having been argued by Chas. L. Holstein, esq., for the said claimant, and by John T. Dye, esq., counsel for the said receiver and for the said railroad company, and the court having been sufficiently advised in the premises, and due deliberation being had thereon, the court finds as matter of fact:

FIRST. That certain interest coupons of the bonds of said railroad company among others were paid and payable by the said railroad company during the last five months of 1870, as set forth in the claim herein, that is to say:

| Kind of bond. | Amount of coupons payable and paid. | When payable. |
|---|---|---|
| First mortgage, series B | $23,345 00 | Sept. 1, 1870. |
| " " series C | 23,310 00 | Nov. 1, 1870. |

SECOND. That no internal-revenue taxes were paid upon said interest coupons above described by the said railroad company.

THIRD. That the said railroad company reserved and retained from the owners of the said interest coupons the sum of $1,275.45 to pay the taxes on said coupons if the railroad company should be liable to pay the same, and afterwards was instructed by Frank M. Greene, a revenue agent, that the said company was not liable to pay said taxes.

FOURTH. That on the 1st day of January, A. D. 1872, certain other interest coupons of the bonds of the said railroad company were
35 paid and payable by the said railroad company, as set forth in said claim, that is to say:

| Kind of bonds. | Amount of coupons payable and paid. | When payable. |
|---|---|---|
| First mortgage, series A | $23,345 00 | January 1st, 1872. |
| Equipment bonds | 4,040 00 | Do. |

FIFTH. That said interest coupons so paid on the 1st day of January, A. D. 1872, were paid out of the earnings of said railroad company earned prior thereto, to wit, during the year 1871.

SIXTH. That no internal-revenue taxes whatsoever were paid by the said railroad company, on the interest coupons so paid on the 1st day of January, A. D. 1872, as aforesaid.

And the court further finds as matters of law:

FIRST. That there was and is no law of the United States imposing an internal-revenue tax upon interest coupons of the bonds of the said railroad company, paid and payable during the last five months of 1870; that the act of July 14th, 1870, does not impose any internal-revenue tax upon such interest coupons unless payable or paid during the year 1871.

SECOND. That there was and is no law of the United States imposing an internal-revenue tax upon interest coupons of the bonds of said railroad company, paid or payable on the 1st day of January, 1872.
36 To which findings of law, and to each of them the United States, by their said counsel, at the time in open court excepts.

And thereupon it is ordered, adjudged, and decreed by the court that the exceptions of the United States to the said master's report herein be, and each of them is hereby overruled. To which ruling the United States at the time excepts.

And it is further ordered, adjudged, and decreed that the exceptions of the said defendant railroad company to said master's report be, and each of them is hereby, sustained. To which ruling of the court the United States, by counsel, at the time excepts.

And thereupon it is further ordered, adjudged, and decreed by the court that the said claim of the United States herein for taxes as aforesaid, for want of law and equity be, and the same is hereby, denied, disallowed, and dismissed. To which judgment of the court the United States, by counsel, at the time excepts.

And thereupon the United States by counsel at the same time, in open

court, pray an appeal to the Supreme Court of the United States, which said appeal the court thereupon allows.

And at the same time, upon motion of the United States, it is further ordered by the court that pending said appeal to the Supreme
37 Court and the final determination of the same therein, the said John H. Devereaux, receiver of said railroad company, do reserve and retain out of any moneys now in his hands, or which may hereafter come into his hands as such receiver, the sum of five thousand dollars ($5,000.00), to await the decision of the Supreme Court upon the said claim of the United States, and to be applied to the payment of the amount, if any, which may be found by the Supreme Court to be due the United States, including interest, penalties, and costs.

38 And at the same time, on said 12th day of May, A. D. 1883, before the honorable John M. Harlan and the honorable William A. Woods, judges as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come the parties, by their respective solicitors, and file their stipulation herein in the words following, to wit:

Come now the United States, by Charles L. Holstein, U. S. district attorney, and also the defendants, The Indianapolis & St. Louis Railroad Company, and John H. Devereaux, receiver thereof, by John T. Dye, esq., their solicitor, and upon suggestion heretofore made by the court, for the purpose of shortening the record and transcript upon appeal in said cause, by omitting the full record of proceedings not directly concerning the claim of the United States, it is hereby stipulated and agreed:

That upon due, regular, and lawful proceedings had in said cause upon the bill of Hinman B. Hurlbut, trustee, &c., against the Indianapolis and St. Louis Railroad Company, to foreclose certain mortgages upon said railroad, given to secure the payment of certain bonds thereof, John H. Devereaux was on May 20, 1882, appointed receiver of said railroad company, and on May 22, 1882, said court entered its decree for the
39 foreclosure of said mortgages and the sale of said railroad, and on July 28, 1882, said railroad was sold under said decree, which said sale was approved and confirmed by said court upon April 13th, 1882.

And it is further stipulated and agreed by and between the said parties that the foregoing memorandum shall be and is a sufficient record of the commencement of said cause, the appointment of said receiver, the decree of foreclosure, the sale of said road, and as to all proceedings in said cause not directly appertaining to the said claim of the United States, and that it shall not be necessary for the transcript on appeal to set forth any parts of the record in said cause other than this stipulation and the record of the filing of the claim of the United States, together with all proceedings had upon or in relation to said claim.

CHARLES L. HOLSTEIN,
*U. S. District Attorney.*
JOHN T. DYE,
*Solicitor for the I. & St. L. R. R. Co.*, and
JOHN H. DEVEREAUX,
*Receiver.*

40 UNITED STATES OF AMERICA,
*District of Indiana, ss:*

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record in the matter of the intervening petition of the United States in the case of Hinman B. Hurlbut, trustee, vs. The Indianapolis and St. Louis Railroad Company, as fully as the same appears of record and remains on file in my office.

Witness my hand and the seal of said circuit court, this 18th day of June, A. D. 1883.

[SEAL] NOBLE C. BUTLER, *Clerk.*

(Indorsement on cover:) No. 525. The United States, intervenor, appellant, vs. The Indianapolis and St. Louis Railroad Company. Hurlbut, trustee, vs. The I. & St. L. R. R. Co. Indiana C. C. U. S. Filed 6th July, 1883.

Office Supreme Court U. S.
FILED.
JAN 27 1885
JAMES H. McKENNEY.
CLERK.

113-711

# In the Supreme Court of the United States.

OCTOBER TERM, 1884.

THE UNITED STATES
*vs.*
INDIANAPOLIS, &C., R. CO. } No. 525.

## BRIEF FOR THE UNITED STATES.

This is a case in which, upon a claim for taxes, the United States intervened in a chancery suit, in the course of which the property of an insolvent railroad company had been placed in the hands of a receiver.

The tax claim was two-fold.

1. Upon interest coupons paid during the last five months of 1870; and

2. Upon interest coupons paid upon the 1st of January, 1872, out of the earnings of the company during 1871.

After a report thereon the court found that certain interest had been paid as above alleged, but held that no tax was due upon either account (pp. 12 and 13).

Acquiescing in that judgment as far as the former claim is concerned, error is now assigned in the second ruling.

*Thereupon it is submitted that the sixth, seventh, and fifteenth sections of the internal-revenue act of July* 14, 1870 (16 Stat., pp. 257 and 260), *imposed a tax upon interest coupons paid out certain corporation earnings for* 1871, *even although such payment were not due or made until the* 1*st day of January*, 1872.

This contention is in effect that the income tax, which by the 6th section of that act was made a general policy for all incomes during 1870 and 1871, is defined in point of subject-matter as regards certain corporations required by the Government to collect such tax, by the date at which accrued the corporation income or earnings out of which such payment was made.

Here it is found that these accrued in 1871.

Such is the reasoning of this court in the case Railroad *v.* Collector, 100 U. S., page 598; and because there was no finding in the record that the interest paid by the company February 1, 1872, had been paid out of its earnings for 1871, such payment was held to be free of tax in Railroad Co. *v.* The United States, 101 U. S., page 550.

Inasmuch as this statute has so often been before the court, and as the claims thereof material here are to be found in the record, pp. 8 and 9, it is thought unnecessary to print the sections at large in this brief.

S. F. PHILLIPS,
*Solicitor-General.*

113-711

JAN 22 1885
JAMES H. McKENNEY,
CLERK.

IN THE

# Supreme Court of the United States.

October Term, 1884.

THE UNITED STATES,
*Appellant,*
*v.*
INDIANAPOLIS & ST. LOUIS RAILWAY CO.,
*Appellee.*
} No. 525.

## *BRIEF FOR THE APPELLEE.*

The question in this case is whether the appellee is chargeable with 2½ per cent. taxes on interest or coupons, payable and paid in good faith, in September and Nober, 1870, and in January, 1872.

The tax can only be authorized by § 122 of the act of June 30, 1864 (13 Stat. at Large, 284), as amended by the act of July 13, 1866 (See § 9–14 Stat. at Large, 38); or by the act of July 14, 1870. (16 Stat. at Large, 261.)

It must be observed at the outset, and borne in mind, that this is not an attempt to levy a tax upon the income or dividends of a corporation, but upon the interest paid upon its bonds.

The statute itself and the decisions make a clear distinction between the tax leviable upon income, or dividends declared, and the tax upon interest or coupons paid. Confusion will be avoided by bearing this in mind throughout the discussion.

The tax upon dividends made by corporations, and interest payable on the bonds of corporations, was regulated by §§ 120 to 123 inclusive, of the act of June 30, 1864.

This was the only act, prior to July 14, 1870, which imposed a tax on dividends and interest payable by railroad companies. The tax paid under this law was 5 per cent.

On July 14, 1870, a new act was passed. Sec. 6 of the new act provided for a 2½ per cent. income tax, upon the income of every person residing in the United States, during the years 1870 and 1871.

Sec. 15 is as follows: "There shall be levied and collected, *for and during the year 1871*, a tax of 2½ per cent. on the amount of all interest, etc., paid on bonds, * * * and on the amount of all dividends of earnings *hereafter declared*."

As I have before said, no question is raised in this case as to whether income or dividends declared after the passage of the act of July 14, 1870, are taxable. This question has been settled by numerous cases.

*Blake* v. *Nat. Banks*, 23 Wall. 316.

The 15th section of the act of July 14, 1870, authorizes the levy of a "tax of 2½ per cent. on the amount of all interest paid on bonds *for and during the year 1871*."

This is the only section of the act of July 14, 1870, which authorizes any tax upon interest paid by railroad companies. This authorizes a tax, not upon interest paid in 1872, nor upon interest paid in 1870, but "*for and during the year 1871*" only.

In *R. R. Co.* v. *United States*, 101 U. S. 550, this court says:

"The interest in this case was neither payable nor paid in 1871. * * * The tax is not on the interest when it accrues, but when it is paid. No provision is made for a *pro rata* distribution of the burden over the time the interest is accumulating, and as the tax can only be levied *for and during the year 1871*, we think, if the interest is in good faith not payable in that year, the tax is not demandable, either in whole or in part."

I respectfully submit that a statute prescribing that a tax shall be levied "*for and during the year 1871*," does not authorize the levy of a tax for and during some other year. This ought to be clear. Unless there is some authority for this tax, besides the 15th section, above quoted, of the act of July 14, 1870 (16 Stat. at Large, 257), it is very clear that it can not be levied.

There is no other section of the act of July 14, 1870, which authorizes it.

Section 17 of the act of July 14, 1870, is as follows:

"Sections 120, 121, 122 and 123 of the act of June 30, 1864," etc., "shall be be construed to impose the taxes therein mentioned, to the first day of August, 1870; but after that date no farther taxes shall be levied or assessed under said sections," etc.

It is thus very clear that, after the first day of August, 1870, no tax could be levied under §§ 120, 121, 122 and 123 of the act of June 30, 1864.

As I said at the outset, the question of income and the question of dividends stand upon a different footing.

The case of *Blake* v. *Nat. Banks*, 23 Wall. 308, involved the question of a tax upon dividends, declared and payable by the banks during the last five months of 1870. The question involved in this case was not involved in that case.

In *Stockdale* v. *Ins. Co.*, 20 Wall. 306, the tax was assessed on "the earnings which had accrued between July 5, 1869, and June 30, 1870.

It will thus be seen that the question in this case did not arise in either of the above cases.

In the case of *Railroad Co.* v. *U. S.*, 101 U. S. 550, which has been quoted from above, Chief Justice Waite, delivering the opinion for the court, citing the two last named cases, held as to interest falling due in 1872, that: "The interest in this case was neither payable nor paid in 1871, and as the tax is not leviable or collectible until the interest is payable, we see no way in which the Company can be charged on this account, * * as the tax can only be levied for and during the year 1871, we think, *if the interest is, in good faith, not payable in that year, the tax is not demandable, either in whole or in part.*"

This disposes of the claim that interest coupons payable in 1872 are subject to be taxed under a statute which provides that the tax shall be levied "*for and during the year 1871*," on "*interest paid* * * on bonds," etc.

An affirmance is respectfully asked.

JOHN T. DYE,
*Solicitor for Appellee.*

112-713

# U. S. SUPREME COURT.

IN THE MATTER OF THE APPLICATION

OF

CLINTON B. FISK

For a Writ of Habeas Corpus.

# PETITION AND RECORD.

MILLER, PECKHAM & DIXON,
*Attorneys for Petitioner Fisk,*
29 WALL STREET, N. Y.

WHEELER H. PECKHAM,
*Of Counsel.*

JOHN R. DOS PASSOS,
*Attorney and Counsel for Respondent Fogg,*
15 BROAD STREET, N. Y.

C. G. BURGOYNE'S "Quick" Print, 146, 148 & 150 Centre Street, N.Y.

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1

# Supreme Court,

NEW YORK COUNTY.

2

FRANCIS A. FOGG,
Plaintiff,

AGAINST

CLINTON B. FISK,
Defendant.

Order to Arrest and Hold to Bail.

TO THE SHERIFF OF THE COUNTY OF NEW YORK:

It having been made to appear to me by the affi- 3
davits of Francis A. Fogg and Henry S. Saunders, that a sufficient cause of action exists against the defendant Clinton B. Fisk, and that the case is one of those mentioned in Article 1st, Chapter 7, Title 1, of the New York Code of Civil Procedure, and that the ground of arrest is that the defendant at the City of New York between the fourth day of December, 1879, and the twenty-fifth day of September, 1880, by means of fraud and deceit induced the plaintiff to purchase from the defendant certain 4
interests in mining stocks and properties and to pay him therefor the sum of sixty-two thousand seven hundred and fifty dollars.

*You are required*, forthwith to arrest Clinton B. Fisk, the defendant in this action, if he is found within your county, and to hold him to bail in the sum of seventy-five thousand dollars, and to return

this order with your proceedings thereunder as prescribed by law.

Dated New York, April 8th, 1882.

C. DONOHUE,
J.

JOHN R. DOS PASSOS,
Plaintiff's Attorney.

Office and P. O. address,
29 Wall Street, N. Y.

[ENDORSED:]

N. Y. Supreme Court. Francis A. Fogg, plaintiff, against Clinton B. Fisk, defendant. Copy order of arrest. John R. Dos Passos, plaintiff's attorney, 29 Wall street, New York City. *Rule 6.* The Sheriff shall file with the Clerk the order or process, and original affidavits on which an arrest is made, within ten days after the arrest. A copy of this rule shall be endorsed on the order of arrest before its delivery to the sheriff.

---

SUPREME COURT,

N. Y. COUNTY.

FRANCIS A. FOGG,
Plaintiff,

AGAINST

CLINTON B. FISK,
Defendant.

Undertaking on Order to Arrest.

Whereas, Francis A. Fogg, the plaintiff above named, has made application to one of the justices

of the above named Court to arrest the above named Clinton B. Fisk in an action for fraud and deceit,

Now, therefore, we, Thomas T. Buckley of No. 112 Montague street, in the City of Brooklyn, and Isaac B. Newcombe of No. 61 East 52d street, in said city, do hereby, pursuant to the statute in such case made and provided, jointly and severally undertake, that if the defendant in the action do recover judgment therein, or, if it is finally decided that the plaintiff is not entitled to the order of arrest, the plaintiff in said action will pay all costs which may be awarded to the defendant and all damages which he may sustain by reason of the arrest in said action, and not exceeding the sum of seven thousand five hundred dollars.

Dated New York, April 8, 1882.

THOMAS T. BUCKLEY,
ISAAC B. NEWCOMBE.

STATE OF NEW YORK,
City and County of New York, } ss.:

THOMAS T. BUCKLEY, being sworn, says that he is a resident and a householder within the State of New York, and worth double the sum specified in the above undertaking, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

THOMAS T. BUCKLEY.

Sworn to before me this 8th day of April, 1882.

CHRISTIAN ZABRISKIE,
Notary Public (7),
N. Y. Co.

13 STATE OF NEW YORK, }
City and County of New York, } ss.:

ISAAC B. NEWCOMBE, being sworn, says that he is a resident and a householder within the State of New York, and worth double the sum specified in the above undertaking over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

ISAAC B. NEWCOMBE.

14 Sworn to before me this 8th day of April, 1882.

CHRISTIAN ZABRISKIE,
Notary Public,
N. Y. Co.

STATE OF NEW YORK, }
City and County of New York, } ss.:

15 I certify that on this 8th day of April, 1882, before me personally appeared the above named Thomas T. Buckley and Isaac B. Newcombe, known to me to be the individuals described in, and who executed the above undertaking, and they severally acknowledged that they executed the same.

CHRISTIAN ZABRISKIE,
Notary Public,
New York Co.

16 [ENDORSED:]

N. Y. Supreme Court. Francis A. Fogg, plaintiff, against Clinton B. Fisk, defendant. Copy Undertaking on Order to Arrest. John R. Dos Passos, plaintiff's att'y, No. 29 Wall street, N. Y.

Approved April 10, 1882, C. Donohue, J.

SUPREME COURT,

NEW YORK COUNTY.

FRANCIS A. FOGG,
Plaintiff,

AGAINST

CLINTON B. FISK,
Defendant.

Summons.

TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney, within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated New York, April 8th, 1882.

JOHN R. DOS PASSOS,
Plaintiff's Attorney.

Office and Post-office address,
No. 29 Wall street,
New York City.

21 NEW YORK SUPREME COURT,
NEW YORK COUNTY.

FRANCIS A. FOGG
AGAINST
CLINTON B. FISK.

22 CITY AND COUNTY OF NEW YORK, ss.:

FRANCIS A. FOGG, being duly sworn, deposes and says as follows:

I am at the present time, and have been since the year 1869, engaged in the business of negotiating railroad loans and as a general broker in notes and securities in the City of New York. I have known the defendant since about the year 1873, having been introduced to him by Andrew Pierce, Esq.,
23 who was at that time the president of the Atlantic & Pacific and Missouri Pacific Railroad Companies. I met the defendant in connection with the business of these companies. Since that time, and especially within the last three years, my acquaintance with the said Fisk has been one of special and close intimacy, and I have been engaged in a great many important business transactions with him other than those hereinafter mentioned. At the time I first met the said Fisk he was the treasurer of the
24 companies above mentioned, and was otherwise largely interested in the same. The said Fisk, I understood, had been a general in the United States army, and since my acquaintance with him he has occupied positions of the highest honor and trust in the service of the United States Government. He was one of the most prominent members of the Methodist Church in the United States; he was the founder of the Fisk University; was looked upon

as an important and influential citizen and business man, and I believe was generally regarded and esteemed as a gentleman of stainless honor and irreproachable character. 25

At and before the times mentioned hereafter the said Fisk was the principal member of the firm of C. B. Fisk & Co., bankers and brokers, carrying on business in the Drexel Building, No. 3 Broad street, in the City of New York. My office was in the same building, and I kept an account with the said firm of C. B. Fisk & Co. The transactions which form 26 the subject matter of this action are divided in this affidavit into three classes—the first embracing the "Mack Morris Mining Company;" the second, the "Golden Eagle Mining Company;" and the third, the "Silver Era Mining Company." All of these transactions were made in the office of C. B. Fisk & Co. Some of the checks or payments which I made as hereinafter stated, were made to C. B. Fisk & Co., some to C. B. Fisk as treasurer, and some to C. B. Fisk individually. Fisk and Williams were 27 the persons actively engaged in all the transactions hereinafter mentioned, the duties of Mackenzie calling him to the Stock Exchange where he was constantly employed.

First. One day, sometime about the 1st of December or last of November, 1879, I was in the office of the firm of C. B. Fisk & Co., when the said Fisk approached me, opened the subject of dealing in mining properties, and informed me that he had made large investments in mines in the Globe Dis- 28 trict, Pinal County, Arizona, and gave a glowing and brilliant description of that county, asserting that he expected to realize the most magnificent returns for his money. He informed me that among other mines in which he was interested was one called the Mack Morris, located in the district and county aforesaid. Fisk subsequently showed me

various documents and letters relating to the mines, and these, together with his vivid descriptions of the vast profits that were sure to be realized, were calculated to, and did, impress me most favorably with the property in question. I entertained the highest respect for Fisk, and implicitly believed in and relied upon any statement that he made concerning the property. The persons interested in this Mack Morris mine had already organized it into a corporation called the Mack-Morris Mining Company, of which the said Fisk was president. The capital stock of the company was 100,000 shares of the par value of $100 each, amounting to $10,000,000.

Fisk offered to sell me some stock of the company, and informed me that the property had been purchased from the owners for $400,000, which was to be paid for, or had been paid for, as follows: To the owners of property, two hundred thousand dollars in cash, the said owners agreeing to leave of that amount the sum of thirty thousand dollars in the treasury of the company for a working capital; and also 49,000 shares of the capital stock of the company, making the round sum of four hundred thousand dollars as the purchase money or at the rate of $4 per share for the said stock. The said Fisk further informed me that he had gone into the purchase of the mine with Mr. Jose F. Navarro and Mr. A. V. Stout, prominent citizens of New York City, and that he had secured the controlling interest of 51,000 shares for the round sum of two hundred thousand dollars, which sum was to be paid to the owners of the property in cash, less thirty thousand dollars for working capital as aforesaid. That the interests had been divided by said Fisk between himself and Messrs. Navarro and Stout as follows: Mr. Navarro 25,000 shares for which he had paid the sum of one

hundred thousand dollars in cash, or $4 per share; 33
that Mr. Stout had taken and paid for 12,500 shares at the rate of $4 per share; and that he, Fisk, had subscribed and actually paid for 12,500 shares at the same rate, viz., fifty thousand dollars in cash.

The said Fisk at and before the time of my purchasing stock in the said company, upon several occasions, assured me in the most impressive and express manner that the actual cash basis or bottom price for the stock was $4 per share, and that his own stock had actually cost him that much in hard 34
cash; that he had not only put his own money into the company but also that of his relatives.

He informed me that no stock could be had at $4 per share, but that he could obtain me a 1,000 shares at a trifle over that figure. To this I demurred, telling him that I would not enter into any mining venture unless on an equal basis with the originators, but he finally overcame my objections, and on or about the 4th day of December, 1879, I agreed to take and purchase 1,000 shares of said stock from 35
him by offering to secure me the stock at $5 per share without commissions. I am informed by John T. Williams, the former partner of Fisk, and verily believe the statement, that the said Fisk was acting as the agent for one Fordyce H. Rogers in the sale of the 1,000 shares which were subsequently delivered to me; that he informed Rogers that he could only get $4 per share for the stock, and that he received the stock from Rogers at that price and obtained from him a commission for so doing of 36
$250 and immediately turned around and delivered the stock to me at $5 per share—thus pocketing a profit of $1,250 by using deception at both ends of the transaction.

I further swear that in the purchase of said 1,000 shares of stock from said Fisk I implicitly believed in and relied upon his statements that $4 per share was

the actual price at which he, Fisk, had paid for his own stock in the company, and that his money was actually and in good faith invested in and at the risk of the enterprise as well as all of the other representations and statements concerning said mining property made to me by said Fisk as to his inability to obtain the 1,000 shares at less than $5 per share. The statements made to me by said Fisk that he had invested fifty thousand dollars in cash and that the stock cost said Fisk at the rate of four dollars per share and that he could not obtain the stock at less than $5 per share, I am informed and verily believe were false and unfounded in fact; that they were well known to be so by him at the time they were so made by the said Fisk; and that such statements or representations were fraudulently made with the purpose and intent to induce me to purchase the one thousand shares of stock from him. He, Fisk, individually did not invest one dollar in the company, his stock not only did not cost him $4 per share but was actually received by him for nothing.

The sources of my information and the grounds of my belief arise out of conversations which I have had with John T. Williams, a former member of the firm of C. B. Fisk & Co., as well as from an examination of an original receipt from Mack Morris to Fisk, a copy of which is hereto annexed marked Exhibit No. 1; from the deposition of George H. Cook taken in a suit pending between John T. Williams and Colin F. Mackenzie against the said Fisk, a copy of which is hereto annexed marked Exhibit No. 2; and from conversation had with the said John T. Williams.

SECOND. I further swear as follows:

About the beginning of the month of February, 1880, the said Fisk again approached me and

asked me to become interested in the Golden Eagle 41
Mining Company. His statements and representations to me upon this subject were as follows: that the property of the Golden Eagle Mining Company was situated in the Globe Mining District, Pinal County, Arizona; that he, Fisk, had seen the property; that there were many thousands of dollars worth of gold ore in sight; that this ore was equivalent to $200,000 in dividends; that the mines of the company were the finest gold mines on the Pacific Coast; that a company had been organized 42
with a capital of ten millions of dollars, divided into one hundred thousand shares of the par value of one hundred dollars each; that the controlling interest in the company had been purchased for one hundred thousand dollars cash; that Mr. Navarro and Mr. Stout and others had become interested in the scheme and that the controlling interest or 51,000 shares had been paid for in cash, and that he, Fisk, had actually invested as his proportion of the said 51,000 shares the sum of twenty-five thousand dol- 43
lars in cash; that said one hundred thousand dollars was to be used as follows, viz.: one hundred thousand dollars to be paid to the owners of the mine, of which they agreed to leave forty thousand dollars for the use of the treasury as a working capital, and 49,000 shares of the capital stock of the company, which was to be the full consideration for the property.

The said Fisk further represented to me that two dollars per share was the actual price which the 44
stock had cost him; that it was the bottom price; that he could procure some stock for me at not less than $2.50 per share, which was only fifty cents per share above the actual cost price. Believing in and relying upon the said representations, I purchased from the said Fisk between the 13th day of February and the 6th day of July, 1880, 3,500 shares of

said stock, for which I paid the said Clinton B. Fisk the sum of $8,750.

I further state that after the property of the said company had been worked and developed for a year or thereabouts, it was found that it would not pay, and could not be profitably worked; not a dollar was ever realized from the property of the company for the benefit of the stockholders, and the company has ceased and suspended its operations upon the said mines. Every statement and representation of said defendant to me in relation to the value of the said mine and the ore it contained, as above set forth, was unfounded and false.

I further swear, upon information and belief, that the said Fisk collected and received large sums of money from the original subscribers to the stock of the Golden Eagle Mining Company; that the principal part of the business appertaining to the purchase of the property was transacted by the said Fisk in person and through his son Charles A. Fisk, who was in Arizona at the place where the mine was situated.

I further state, upon like information and belief, that the said Fisk did not pay for the property or mines of the Golden Eagle Mining Company the sum of sixty thousand dollars; but, on the contrary, the said Fisk only paid for the mines which became the property of said company a sum not exceeding thirty-five thousand dollars, and in that sum were included two mines, viz.: the Gold Hill and Iowa, which were not conveyed to the company, but were held as the property or under the control of said Fisk.

I further state, upon like information and belief, that the original stock subscribed for by said Fisk did not cost him anything; but, on the contrary, the said Fisk received the same for nothing and made a

clear profit of ten thousand dollars and upwards out of the transaction.

The sources of my information and the grounds of my belief, so far as any portion of this affidavit relating to the Golden Eagle Mining Company is made upon information and belief, arise out of and are based upon conversations had by me with John T. Williams, a former partner of the firm of C. B. Fisk & Co., and from an inspection of abstracts of accounts of said transactions on the books of C. B. Fisk & Co., showing the actual payments made for the mines of said company.

I further state that the statements and representations made to me by the said Fisk were fraudulently made for the purpose of inducing me to purchase the said stock, which he sold me, and that such statements and representations were false and unfounded and known to be false by the said Fisk at the time he made them to me.

THIRD. I further swear as follows:

That during the progress of the transactions mentioned in the preceding portion of this affidavit, to wit: at the City of New York in the early part of February, 1880, the said Fisk again approached me and asked and requested me to join with him in the purchase of a certain mine known as the Silver Era Mine, located in the Globe Mining District, Pinal County, Territory of Arizona aforesaid. He represented that this silver mine was a most wonderful one; that it had already produced from $75,000 to $80,000; that there was ore on the dump ready for a mill, worth more than enough to repay the whole purchase money of $75,000; that he had investigated it thoroughly himself, and that it was one of the best mines in the district, and that the ore taken from said mine averaged from $40 to $50 per ton. The said Fisk further represented that for the pur-

pose of raising money to go into the enterprise he had sold gas and other stocks which had been held a long time in his family, and subsequently and before making the last payments hereinafter described, represented that he had invested $8,500 of the money of his son in the mine.

The said Fisk further stated and represented that the lowest figure at which the mine could be purchased was seventy-five thousand dollars in cash and thirty-five thousand shares of stock in a company to be formed with a capital of ten million of dollars, divided into one hundred thousand shares of one hudred dollars each; that he informed me that he wished me to purchase one-quarter of 55,000 shares, viz.: thirteen thousand seven hundred and fifty shares in said company for the sum of $25,000 cash, and that if I would do so he, the said Fisk, would also put in $25,000 cash and take one-quarter interest in the mine; that he wanted me to become president of the company, and that by this joint investment of $25,000 each we would become owners of one-half of the controlling interest; that the balance of the stock should be sold as follows: One-quarter to be held for sale to raise an additional $25,000 to make up the purchase money to pay for the mine, and the remaining one-quarter to be held in the treasury for working capital—the said division of the stock to be represented in the figures following:

| | SHARES. | |
|---|---|---|
| Whole amount of stock | 100,000 | |
| Amount reserved for part purchase of mine | 35,000 | |
| ¼ of 55,000 to Fisk | 13,750 | $25,000 |
| ¼ " " " Fogg | 13,750 | 25,000 |
| ¼ " " for sale | 13,750 | 25,000 |
| ¼ for working capital | 13,750 | 25,000 |
| | 90,000 | $100,000 |

| | |
|---|---|
| Bonus of stock to be distributed among subscribers..... | 10,000 |
| | 100,000 |

That the object of this division of the stock was to procure the sum of seventy-five thousand dollars in cash to be used as purchase money for the mine, and twenty-five thousand dollars working capital. In pursuance of the plan of said Fisk as above set 58
forth, a corporation was duly formed under the laws of the State of New York, called the Silver Era Mining Company, with a capital of $10,000,000, divided into 100,000 shares of the par value of $100 each, of which I became president and the said Fisk treasurer, and the said John T. Williams secretary.

That believing in and relying upon the representations and statements concerning the condition and value of the said property, and the amount required to purchase the said mine, and of the proportion of 59
cash to be contributed by the said Fisk, as well as upon all of the other statements and representations heretofore or hereinafter set forth relating to the said company and the acts of said Fisk, I was on the 11th day of February, 1880, induced to pay to the said C. B. Fisk the sum of twenty-five thousand dollars for 13,750 shares of the stock of said company, and on the 27th day of February, 1880, to make an additional payment of $12,000 to said Fisk for 6,600 shares of stock of said company, being 60
$\frac{12}{25}$ths of the stock held for sale; and on the 25th day of June, 1880, on the 13th day of August, 1880, and on the 25th of September, 1880, respectively, I made additional payments to the said Clinton B. Fisk as treasurer of the said company, amounting in the aggregate to $12,500 for 6,875 shares of the treasury stock of said company.

61 Each of the said payments of money that I made to said Fisk was made by me upon the express representation and statement of said Fisk that he was contributing and paying towards the purchase of and investing his own money in the said mine and company, to the same extent in actual cash as I put in; and he many times subsequently informed me that the said money had all been put in by him, and that his own and my funds had been deposited in the Shoe and Leather Bank of
62 the City of New York, and that he, said Fisk, had actually checked out from the funds so deposited in said bank the sum of seventy-five thousand dollars in payment of the said mine; that of this last named amount, he, Fisk, had paid to H. S. Saunders, one of the owners of the property, the sum of forty thousand dollars in cash.

I am informed, and verily believe, that, with but one exception, viz.: the payment by Fisk for his proportion of the treasury stock, which was not in
63 substance a payment of his own money, all of the said statements and representations of said Fisk to me, and upon the faith of which I was induced to make to him the payments aforesaid, were false and unfounded; that the said mine or property of the said Silver Era Mining Company was not purchased by said Fisk for the sum of seventy-five thousand dollars in cash; that the said Fisk did not directly or indirectly contribute and pay the sum of $25,000 in cash for one-fourth of the 55,000 shares of stock, or
64 any sum in cash, and that he did not invest a single dollar in cash of his own money in the whole enterprise. On the contrary, the said Fisk did not pay for said mine a sum exceeding $46,667 in cash, and whatever money he, the said Fisk, used in the purchase of said mine or property was obtained from me and from the sale of stock to other parties by the said Fisk; and that the said Fisk's stock in

said company did not cost him one dollar in cash, 65
except the payment of the treasury stock aforesaid,
but was and is all clear gain; and I am further in-
formed, and believe, that the statements in respect
to the quantity and value of ore on the dump in
said mine were grossly and intentionally exagger-
ated, false and fraudulent, and I am further in-
formed, and believe, that the said Fisk, before re-
ceiving my money, was informed by telegram that
the said mine was not a substantial and good one,
but was a bad mine to invest money in. 66

I further state, that all of those statements and representations made by said Fisk to me were known to be false and unfounded in fact by him, and were fraudulently made to me to induce me to part with my money, or to make the payments aforementioned.

After considerable money had been expended in working and developing the said mine, the result reached was that it was a failure, and it would not pay to work, and the representations of said Fisk 67
concerning the quality and quantity of the ore in and about said mine were exaggerated, fraudulent and false.

The sources of my information, and the grounds of my belief, so far as any portion of this affidavit relating to the Silver Era Mine, and Company, is stated on information and belief, are as follows:

1st. I have seen a check, No. 1376, drawn by Clinton B. Fisk & Co., on the Continental National Bank of New York, for $25,000, to the order of 68
Clinton B. Fisk, Treas., dated February 16, 1880, endorsed Clinton B. Fisk, Treas., for deposit to the credit of Clinton B. Fisk, a copy of which check is hereto annexed, marked Exhibit No. 3. I am informed by John T. Williams, the former partner of Fisk, and verily believe the statements, as follows: that this check was never negotiated, presented or

69 paid at the bank on which it was drawn. The check was cut and cancelled by order of said Fisk to make it appear as if it had been paid, and it was intended to deceitfully represent an actual payment of $25,000, as the share of the said Fisk in the enterprise aforesaid. This said check was actually presented and shown to one or more persons as evidence of Fisk's actual contribution of his money. I was further informed by the said John T. Williams, and verily believe the statement, that after the said last named
70 check was drawn, it was handed to the said Fisk, and that he, Fisk, then delivered to the said Williams another check drawn by himself, the said Fisk, individually, on the National Shoe and Leather Bank for a similar amount of $25,000, to the order of H. S. Saunders and George B. Walker, two persons who were interested originally in the said Silver Era Mining property; that at the time the said Fisk delivered the last named check to the said Williams it was endorsed by them, but as a matter of fact
71 neither the said Saunders and Walker ever received the money represented by said check, or any part thereof; the said check was never negotiated, never passed through bank, never was paid, but it was deceitfully intended to make it appear that the said Saunders and Walker had actually received the said sum of twenty-five thousand dollars as part of the purchase money of said mine, when such was not the fact.

72 2d. From conversations had with John T. Williams, the said former partner of said Fisk, who was familiar with the transaction in question, and who kept the accounts in the office of C. B. Fisk & Company.

3d. From original memoranda made by said defendant C. B. Fisk relative to the Silver Era Mining Company, copies of which are hereto annexed, marked Exhibits Nos. 4 and 5.

I further state that this action is brought to recover the several sums paid by me to Fisk under the circumstances above set forth, amounting in the aggregate to the sum of $62,750 with interest from the time each of said payments were made, which said principal and interest amount at this date to the sum of sixty-nine thousand seven hundred and thirty-eight $\frac{50}{100}$ dollars; and that I have commenced an action in this Court by the issuance of a summons for the recovery of the sums of money aforementioned. 73 74

I further state that no previous or other application has been made for the order herein.

(Signed) FRANCIS A. FOGG.

Sworn to before me this 8th day of April, 1884.

CHRISTIAN ZABRISKIE,
Notary Public,
N. Y. Co.

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## CROSS-INTERROGATORIES.

FIRST. To the first cross-interrogatory he saith: I was introduced to Clinton B. Fisk on October 10, 1879, by M. A. Baldwin, at Florence, aforesaid. I did not know him before. I met him afterward in the town of Globe, in what was then Pinal County, A. T. 76

SECOND. To the second cross-interrogatory he saith: The agreement for the sale of the interests as aforesaid of Stiles, Thomas and myself was in writing. I do not know whether there was any agreement in writing or otherwise for the sale of the one-half interest owned as aforesaid by Mack Morris.

77 THIRD. To the third cross-interrogatory he saith: The Mack Morris mine was originally located in the names of M. L. Stiles and Mack Morris as locators. I was in the camp in which the mine was situated. I arrived there on February 23, 1876, and I was there nearly all the time from that date until the time of the sale on October 10, 1879. When I arrived in the camp on February 23, 1876, Mack Morris was in possession of the mine and was working upon it. About five weeks after my arrival there I
78 received a letter from said Stiles, asking me to move on to the said mine and represent his interest there. I immediately informed Mack Morris of this request. He admitted the interest of Stiles, and consented to my acting for him in the matter. I forthwith entered upon the mine, in the interest of Stiles, in accordance with his said request, and from that time forth worked upon the mine in company with Mack Morris. About two years after my arrival in the camp as aforesaid, a question arose as
79 to the exact date of the location of the mine, and for the purpose of ascertaining this I referred to the records of the Globe Mining District in which the mine is situated, and in those records I saw and read the original notice of location. The notice, as there recorded, was signed by M. L. Stiles and Mack Morris, as locators. I do not now remember the exact date of the notice, as so recorded, but it was some time in February, 1876, and prior to February 23, 1876. It was on or about February 11, 1876. The
80 question of date arose incidentally in conversation. The record of the notice referred to was in the handwriting of Mack Morris, and was signed by him as Deputy Recorder of the district at the time the location of the mine was made. Some months after I went upon the mine for Stiles as aforesaid, he conveyed to said Thomas and myself by deed an undivided two-sixths interest in said mine, being an

undivided one-sixth interest to said Thomas, and a like interest to myself. The deed was signed by Stiles and acknowledged and certified under seal. This deed was in consideration of a deed from said Thomas and myself to said Stiles conveying to him an interest in certain mines then held by Thomas and myself. The two deeds were made at about the same time. 81

FOURTH. To the fourth cross-interrogatory he saith: I do not know of any sale of the whole mine on or about October 10, 1879, but only of three-sixths of it as mentioned in my answer to the third direct interrogatory. At that sale said Stiles, Thomas, Clinton B. Fisk and myself were present as before stated. M. A. Baldwin and A. Hammerslag were also present at the time of the execution of the deed. Granville H. Oury, the attorney who prepared the deed, was present part of the time that the parties were assembled for the transaction of the sale, but he was not there all the time, I think. The transaction was in the office of a store in Florence aforesaid, and other persons were passing in and out upon other business, but to the best of my recollection the persons whom I have named as being present were the only persons who were there in connection with the sale, or who paid any attention to it. 82 83

FIFTH. To the fifth cross-interrogatory he saith: The amounts paid were the sum of ten thousand dollars to each of said Stiles, Thomas and myself as is stated in my answer to direct interrogatory. I saw these respective amounts paid in United States gold coin, and saw each man take his money, $10 000 each. 84

SIXTH. To the sixth cross-interrogatory he saith:

85 At the time of the sale of October 10, 1879, the defendant, Clinton B. Fisk, was personally present as before stated. He read the deed to me himself, paid me the money ($10,000) himself. The deed was already prepared at the time that I first met him, and the money laid out ready for delivery so that the sale occupied but a few minutes. The written agreement for the sale, mentioned in my answer to the second cross-interrogatory, was made to M. A. Baldwin, and the deed was prepared and the sale
86 made in pursuance of that agreement, only the deed was to Fisk and others as aforesaid, instead of to Baldwin. I understood that Baldwin had transferred his rights under the agreement accordingly. He was present at the sale. Nothing further of any consequence took place between me and Fisk.

SEVENTH. To the seventh cross-interrogatory he saith: I do not know that I know anything more that would tend to either benefit or injure the de-
87 fendant.

Subscribed to by me, the above named witness, this March 13, 1882.

GEORGE H. COOK.

J. D. BOYER,
Commissioner.

STATE OF CALIFORNIA, }
County of San Bernardino, } ss.:

88 I, J. D. BOYER, do certify that George H. Cook, the witness, personally appeared before me on the thirteenth day of March, A. D. 1882, at three o'clock in the afternoon, at my office, in the Town of San Bernardino, County of San Bernardino, and State of California, and after being sworn to testify the truth, the whole truth and nothing but the truth, did depose to the matters contained in the foregoing

deposition, and did in my presence subscribe the same. And I further certify that I have subscribed my name to each half-sheet thereof. I further certify that the examination of said witness was wholly upon the written interrogatories and cross-interrogatories hereto annexed, and that no one appeared on behalf of either the plaintiff or the defendant in the foregoing entitled action. 89

J. D. BOYER,
Commissioner.

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PLAINTIFF'S AFFIDAVIT, EXHIBIT NO. 3.

No. 1,376.

OFFICE OF CLINTON B. FISK & CO.,
No. 3 Broad street.

NEW YORK, Feby. 16, 1880. 91

CONTINENTAL NATIONAL BANK.

Pay to the order of Clinton B. Fisk, Treas., twenty-five thousand dollars.
$25,000.

CLINTON B. FISK & CO.

Endorsed on back of above check:

CLINTON B. FISK,
Treas. 92

For Deposit
to the credit of
Clinton B. Fisk.

93 PLAINTIFF'S AFFIDAVIT, EXHIBIT NO. 4.

| | | |
|---|---|---|
| Francis A. Fogg | | $25 000 |
| Francis A. Fogg, Trustee | $3 000 | |
| " " " " | 3 000 | |
| " " " " | 1 000 | 7 000 |
| Clinton B. Fisk & Co | | 25 000 |
| M. Seligman | | 5 000 |
| Ja's Clyne | | 3 000 |
| Wm. J. Hutchinson | | 5 000 |
| 94 Hutchings, Spear, Van Cott } C. B. F. & Co | 5 000 | 5 000 |
| | | $75 000 |

Dobson & Fogg, $25 000.

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95 PLAINTIFF'S AFFIDVIT EXHIBIT No. 5.

SILVER ERA MEMORANDA.

C. B. F. & Co. paid in $25,000 and received 13,750 shares of stock.

F. A. F. did the same.

In order to provide $25,000 for the 13,750 shares of Treasury stock, it was agreed that F. Co. & F. should each take one-half of the stock in Treasury on original basis, to wit, each party to take 6,875
96 shares to pay into the Treasury each $12,500. C. B. F. put $500 into the Treasury as ½ of the first $1,000 and should have credit for that sum at C. B. F. & Co. C. B F. borrowed from the Treasury stock 2,875 shares which he returns, and which added to the 4,000 shares in Treasury will give to C. B. F. & Co. 6,875 shares of stock for their $12,500—making their holdings of Silver Era on original subscription

for themselves 13,750 shares and full Treasury stock 6,875 shares, total 20,625 shares supplemented by such other shares as their customers may not have yet taken and paid for. 97

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NEW YORK SUPREME COURT,

NEW YORK COUNTY.

98

FRANCIS A. FOGG

AGAINST

CLINTON B. FISK.

CITY AND COUNTY OF NEW YORK, SS.:

HENRY S. SAUNDERS, being duly sworn, deposes and says : 99

I reside in the City of New York. I am engaged in the mining business. I know the property called the "Silver Era," which was subsequently used to organize the Silver Era Mining Company. The property comprised three claims—known as the Era, Aetna and Caledonia. It was situated in the Globe Mining District, Arizona. I was the owner of one-half of the property, and held the legal title to the entire property by consent of the owner of the other half interest, viz.: R. H. Watson, who lived at Globe 100 aforesaid. The full title was placed in my hands to enable me to dispose of the same. Before I became the one-half owner of the property, it was bonded to George B. Walker, of San Francisco, California, by the then owners, viz., the said Watson and by one Cornelius A. Milner, of Globe aforesaid. By the said bond the owners had agreed to sell and convey

the said Silver Era property for forty thousand dollars.

Subsequently the full title to the mine was vested in me as aforesaid, and Walker's interest in the property was merely to the extent of any commissions which he might earn by the sale of the property. I know the defendant C. B. Fisk.

I first met the said defendant about the first part of January, 1880. I met him in connection with the negotiations which resulted in the sale of the Silver Era mining property aforesaid to the said Fisk.

After several interviews the said defendant agreed to purchase the property. In the sale of the property I represented myself and the owner of the other half interest, and I received all of the money paid by Fisk for the said property as follows:

The first payment made me for the said property by said Fisk was made in February, 1880; at that time I received from said Fisk the sum of fifteen hundred dollars ($1,500). At the same time the said George B. Walker received from said Fisk a similar amount of fifteen hundred dollars ($1,500).

The next payment I received was the sum of eighteen hundred and thirty-three $\frac{34}{100}$ dollars ($1,833.34). This payment was also made by said Fisk to me in February, 1880.

On February 16, 1880, I received another payment of twenty thousand dollars ($20,000), and on or about the 30th day of March, 1880, I received another and last payment of twenty thousand dollars ($20,000.) I think that all the payments were made in the checks of C. B. Fisk or C. B. Fisk & Company. The total amount received by me in behalf of myself and Mr. Watson, the other half owner, was forty-three thousand three hundred and thirty-three $\frac{34}{100}$ dollars ($43,333.34).

This, together with a sum sufficient to make up

fifty thousand dollars, which was divided in some way between the said Walker and the said Fisk, or others, was the full and entire consideration in money by me from the said Fisk for the property. Upon receiving the first payment of twenty thousand dollars, I executed and delivered the deed for the property, which, under the direction of the said Fisk, was made directly to the Silver Era Mining Company. 105

Before the consummation of the transaction, the said Fisk presented to me a check for $25,000, which he requested me to indorse. This check had been already made out and signed before I was requested to indorse it. I did indorse it, as also did George B. Walker, at the like request of Fisk. I do not know for what purpose or how the check was to be used or disposed of. The check was never delivered to me, and I never received the money represented by the said check or any part thereof. 106

Upon reading over this affidavit, I desire to add that I cannot state precisely in what order the payments were made to me; whether the sum of fifteen hundred or twenty thousand dollars was made first. 107

H. S. SAUNDERS.

Sworn to before me this 5th day of April, 1882.

JOHN M. RIDE,
Notary Public,
Kings Co. 108

Certificate filed in N. Y. Co.

[ENDORSED:]

N. Y. Supreme Court. Francis A. Fogg against Clinton B. Fisk. Copies Affidavits and Order of Arrest and Summons. John R. Dos Passos, Plaintiff's Attorney, 29 Wall street, New York City.

109 SUPREME COURT,
NEW YORK COUNTY.

FRANCIS A. FOGG,
Plaintiff,

AGAINST

CLINTON B. FISK,
Defendant.

Trial to be had in the County of New York.

110

The plaintiff, by John R. Dos Passos, his attorney, for complaint against the defendant above named, alleges upon information and belief and shows as follows:

FIRST. For a first and separate cause of action against the defendant, the plaintiff alleges upon information and belief as follows:

111 That heretofore, at the City of New York, on or about the first day of December, 1879, the defendant Clinton B. Fisk approached this plaintiff and opened the subject of dealings in mining properties, and then and there offered to sell to plaintiff stock in a company organized under the laws of the State of New York, called the Mack Morris Mining Company.

Plaintiff further shows that the said defendant represented that the property of said Mack Morris
112 Mining Company consisted of a mine located in the Globe Mining District, Pinal County, Arizona, and had been organized into a corporation called the Mack Morris Mining Company, and that the said defendant Clinton B. Fisk was the president thereof. That the capital stock of said company was 100,000 shares of the par value of $100 each, amounting to $10,000,000.

That as an inducement for plaintiff to invest his 113
money in the stock of said Mack Morris Mine, the
defendant showed to plaintiff various documents
and letters relating to the same and these, together
with his vivid descriptions and representations of
the vast profits that were sure to be realized from
said mine were calculated to and did impress plain-
tiff most favorably with the property in question.

That thereupon the said defendant offered and
desired to sell some of said stock to plaintiff, and as
an additional inducement to plaintiff to purchase 114
the same, represented to him that the property of
said mining company had been purchased from the
owners thereof for the sum of $400,000, which was
to be paid for or had been paid for as follows:

To the owners of the property the sum of two
hundred thousand ($200,000) dollars in cash, the
said owners agreeing to leave of that amount the
sum of thirty thousand ($30,000) dollars in the treas-
ury of the company as a working capital, and also
49,000 shares of the capital stock of the company, 115
making the round sum of $400,000 as the purchase
money for said mine or at the rate of $4 per share
for the said stock.

And as a further inducement for plaintiff to pur-
chase the said stock the defendant also represented
to plaintiff that he had gone into the purchase of
the said Mack Morris Mine with Mr. Jose F. Navar-
ro and Mr. A. V. Stout, prominent citizens of New
York City, and that the controlling interest of 51,000
shares, or 50,100 shares, had been obtained for the 116
round sum of two hundred thousand ($200,000) dol-
lars, which sum was to be paid to the owners of the
property in cash, less thirty thousand ($30,000) dol-
lars for working capital as aforesaid, together with
the 49,000 shares aforesaid.

The said defendant further represented as an in-
ducement to have plaintiff purchase said stock as

117 aforesaid, that the interests therein had been divided by said defendant between himself and Messrs. Navarro and Stout as follows: Mr. Navarro 25,000 shares, for which he had paid the sum of $100,000 in cash, or $4 per share; that Mr. Stout had taken and paid for 12,500 shares at the rate of $4 per share, and that he, said defendant Fisk, had subscribed and actually paid for 12,500 shares at the same rate, viz., fifty thousand ($50,000) dollars in cash, or $4 per share for said stock.

118 Plaintiff further shows that the said defendant, at and before the time of the purchase by said plaintiff of stock in said company upon several occasions assured plaintiff and represented to him as an inducement to purchase said stock, that the actual cash basis, or bottom price, for the stock was four ($4) dollars per share, and that his own stock had actually cost him that much in hard cash, and that he had not only put and paid his own money into the company, but also that of his relatives.

119 That said defendant further represented to plaintiff that no stock could be purchased at $4 per share, but that he could obtain for and deliver to plaintiff 1,000 shares at a trifle over that figure. That thereupon plaintiff, on or about the 4th day of December, 1879, agreed to take and purchase 1,000 shares of said stock from defendant, he offering to secure plaintiff said stock at $5 per share, without commission.

Plaintiff further shows that he is informed and
120 verily believes that the said Fisk was acting as the agent for one Fordyce H. Rogers in the sale of the 1,000 shares, which were subsequently delivered to plaintiff, pursuant to said agreement; that the defendant informed Rogers he could only get $4 per share for the stock, and that he received the stock from Rogers at that price, and obtained from him for so doing a commission of $250, and immediately

afterwards delivered the stock to plaintiff at $5 per 121
share, thus realizing a profit of $1,250 by using deception at both ends of the transaction.

Plaintiff further shows that on the purchase of said 1,000 shares of stock from the defendant, plaintiff implicitly believed in and relied upon the statements and representations of said defendant that $4 per share was the actual price at which he, the said Fisk, had paid for his own stock in the company, and that the defendant's money was actually and in good faith invested in and at the risk of the enter- 122
prise, as well as all of the other representations and statements concerning said mining property made to plaintiff by said defendant Fisk, as well as to his inability to obtain the 1,000 shares at less than $5 per share.

Plaintiff further alleges, upon information and belief, that the representations and statements made to plaintiff by said defendant that he had invested fifty thousand ($50,000) dollars in cash in said company, and that the said stock cost said Fisk at the 123
rate of four dollars per share, and that he could not obtain the stock at less than $5 per share, were each and every one of them false and unfounded in fact; that they were well known to be so by the defendant at the time they were so made by him to plaintiff, and that such statements and representations were fraudulently made with the purpose and intent to induce plaintiff to purchase the one thousand shares of stock from him, which plaintiff did, paying the said defendant for the same the sum of 124
five thousand ($5,000) dollars.

SECOND. For a second and separte cause of action against the said defendant, the plaintiff further alleges, upon information and belief, as follows:

That heretofore at the said City of New York, in or about the month of February, 1880, the said Fisk

125 again approached this plaintiff in relation to certain mining stocks, and offered plaintiff to sell him stock in a certain company called the Golden Eagle Mining Company. That the statements and representations made by the said defendant to plaintiff in relation to the property and company were as follows: That the property of the Golden Eagle Mining Company was situated in the Globe Mining District, Pinal County, Arizona; that he, the said defendant Fisk, had seen the property; that there
126 were many thousands of dollars worth of gold ore in sight; that this ore was equivalent to $200,000 in dividends; that the mines of the company were the finest gold mines on the Pacific Coast; that a company had been organized with a capital of $10,000,000, divided into 100,000 shares of the par value of $100 each; that the controlling interest in the company had been purchased for $100,000 cash; that Mr. Navarro and Mr. Stout and others had become interested in the scheme, and that the controlling in-
127 terest of 51,000 shares had been paid for in cash, and that he, Fisk, had actually invested as his proportion of the said 51,000 shares the sum of $25,000 in cash; that said $100,000 was to be paid as follows, namely: $100,000 to be paid to the owners of the mine, of which they agreed to leave forty thousand ($40,000) dollars for the use of the treasury as a working capital, and 49,000 shares of the capital stock of the company, which was to be the full consideration for the property.

128 That as a further inducement to plaintiff to purchase the stock of said company and to become interested in said company, the said defendant represented to plaintiff that two dollars per share was the actual price which the stock had cost him; that it was the bottom price; that he could procure some stock for plaintiff at not less than $2.50 per share, which was only fifty cents per share above the ac-

tual cost price. That believing in and relying upon 129
the said representations, the plaintiff purchased from said defendant Fisk between the 13th day of February and the 6th day of July, 1880, 3,500 shares of said stock, for which plaintiff paid the said defendant the sum of $8,750.

Plaintiff further shows that after the property of the said company had been worked and developed for a year or thereabouts, it was found that it would not pay and could not be profitably worked; that not a dollar was ever realized from the property of the 130
company for the benefit of the stockholders, and the company has ceased and suspended its operations upon the said mines.

Plaintiff further shows that every statement and representation of said defendant to plaintiff in relation to the value of the said mine and the ore it contained and the dividends it could pay, as above set forth, was unfounded, false and fraudulent, was known so to be when made by said defendant, and that the said representations were made to induce 131
plaintiff to pay his money to defendant for said stock.

Plaintiff further alleges, upon information and belief, that the said Fisk collected and received large sums of money from the original subscribers to the stock of the said Golden Eagle Mining Company; that the principal part of the business appertaining to the purchase of the property was transacted by the defendant Fisk in person, and through his son Charles A. Fisk, who was in Arizona at the 132
place where the mine was situated.

Upon like information and belief, plaintiff further alleges that the said defendant Fisk did not pay for the property or mines of the Golden Eagle Mining Company, or for a controlling interest in the same the sum of $60,000, but on the contrary, the said Fisk only paid for the mines which became the

property of said company a sum not exceeding $35,000, and in that sum were included not only the Golden Eagle, but two other mines, namely, the Gold Hill and Iowa, which were not conveyed to the company, but were held as the property or under the control of said Fisk.

Plaintiff further shows, upon like information and belief, that the original stock subscribed for by said Fisk did not cost him anything, but on the contrary, the said Fisk received the same for nothing, and made a clear profit of $10,000 and upwards out of the transaction.

Plaintiff further alleges, that all the statements and representations made by the said Fisk as aforesaid to plaintiff, were fraudulently made for the purpose and intent of inducing this plaintiff to purchase the said stock which he sold to plaintiff, and that such statements and representations were false and unfounded, and known to be false by the said defendant Fisk at the time he made them to said plaintiff.

THIRD. For a third and separate cause of action against the said defendant, the plaintiff further alleges, upon information and belief, that during the progress of the transactions mentioned in the second paragraph or subdivision of this complaint, to wit, at the City of New York, in the early part of February, 1880, the said defendant Fisk again approached this plaintiff, and asked and requested plaintiff to join with him in the purchase of a certain mine known as the Silver Era Mine, located in the Globe Mining District, Pinal County, Territory of Arizona, aforesaid. That the said defendant thereupon represented and stated to plaintiff that this silver mine was a most wonderful one; that it had already produced from $75,000 to $80,000; that there was ore on the dump ready for a mill worth more than enough to repay the whole purchase

money of $75,000; that he had investigated it 137
thoroughly himself, and that it was one of the best mines in the district, and that ore taken from said mine averaged from $40 to $50 per ton.

The said Fisk further represented that for the purpose of raising money to go into the enterprise, he had sold gas and other stocks which had been held a long time in his family, and subsequently and before making the last payments hereinafter described, represented and stated that he had invested $8,500 of the money of his son in the mine. 138

The said defendant further stated and represented to this plaintiff, that the lowest figure at which the mine could be purchased was $75,000 in cash, and 35,000 shares of stock in a company to be formed with a capital of $10,000,000, divided into $100,000 shares of $100 each; that he informed plaintiff that he wished plaintiff to purchase one-quarter of 55,000 shares, viz., 13,750 shares in said company for the sum of $25,000 cash; and that if plaintiff would do so, he, the said Fisk, would also put in $25,000 cash 139
and take one-quarter interest in the mine; that he wanted plaintiff to become president of the company, and that by this joint investment of $25,000 each the plaintiff and said defendant would become owners of one-half of the controlling interest; that the balance of the stock should be sold as follows: one-quarter to be held for sale to raise an additional $25,000 to make up the purchase money to pay for the mine, and the remaining one-quarter to be held in the treasury for working capital, the said 140
division of the stock to be represented in the figures following:

Whole amount of stock..... 100,000 shares.

| | SHARES. | |
|---|---|---|
| Amount reserved for part purchase of the mine..... | 35,000 | |
| ¼ of 55,000 to Fisk, (defendant) | 13,750 | $25,000 |

| | | | |
|---|---|---|---|
| 141 | ¼ " " " Fogg,(plaintiff). | 13,750 | 25,000 |
| | ¼ " " for sale..... | 13 750 | 25,000 |
| | ¼ for working capital..... | 13,750 | 25,000 |
| | | 90,000 | $100,000 |
| | Bonus of stock to be distributed among subscribers..... | 10,000 | |
| | | 100,000 | |

142 That the said defendant represented that the object of this division of the stock was to procure the sum of $75,000 in cash to be used as purchase money for the said mine, and $25,000 working capital, and that in pursuance of the plan of said Fisk, as above set forth, a corporation was formed under the laws of the State of New York, called the Silver Era Mining Company, with a capital of $10,000,000, divided into 100,000 shares of the par value of $100 each, of which the plaintiff herein became president,
143 and the said defendant Fisk, treasurer, and one John T. Williams, then a partner with said Fisk, secretary.

Plaintiff further shows that, believing in and relying upon the representations and statements of said Fisk concerning the condition and value of the said property and the amount required to purchase the said mine, and of the proportion of cash to be contributed by the said defendant Fisk, as well as upon all the other statements and representations
144 heretofore or hereinafter set forth relating to the said company and the acts of the said Fisk, plaintiff was on or about the 11th day of February, 1880, induced to pay to the said C. B. Fisk the sum of $25,000 for 13,750 shares of the stock of said company; and on or about the 27th day of February, 1880, to make an additional payment of $12,000 to said Fisk for 6,600 shares of stock of said company,

being $\frac{12}{25}$ths of the stock held for sale; and on or about the 25th day of June, 1880, on or about the 13th day of August, 1880, and on or about the 25th day of September, 1880, respectively, plaintiff made additional payments to the said defendant Fisk as treasurer of said company amounting in the aggregate to $12,500 for 6,875 shares of the treasury stock of said company. 145

That each of the payments of money that plaintiff made to said defendant as aforesaid was made by plaintiff upon the express representation and statement of said Fisk that he was contributing, paying towards the purchase of, and investing his own money in the said mine and company to the same extent in actual cash as plaintiff put in; and he many times subsequently informed plaintiff that the said money had all been put in by him, and that his own and plaintiff's funds had been deposited in the Shoe and Leather Bank of the City of New York, and that he, the said defendant had actually checked out from the funds so deposited in said bank the sum of $75,000 in payment of said mine; that of this last named amount he, said defendant, had paid one H. S. Saunders, one of the owners of the property, the sum of forty thousand ($40,000) dollars in cash. 146 147

Plaintiff further alleges, upon information and belief, that with but one exception, viz.: the payment by said defendant of his proportion of the treasury stock which was not in substance a payment of his own money, all of the said statements and representations of the said defendant to plaintiff and upon the faith of which plaintiff was induced to make to defendant the payments aforesaid, were false and unfounded; that the said mine or property of the said Silver Era Mining Company was not purchased by said defendant for the sum of $75,000 in cash; that the said defendant Fisk did not directly or indirectly contribute and pay the sum of $25,000 in 148

149 cash for one-fourth of the 55,000 shares of stock, or any sum in cash, and that he did not invest a single dollar in cash of his own money in the whole enterprise. That, on the contrary, the said Fisk did not pay for said mine a sum exceeding $46,667 in cash, and whatever money he, the said Fisk, used in the purchase of the said mine or property was obtained from the plaintiff and from the sale of stock to other parties by the said defendant; and that the said Fisk's stock in said company did not cost him one
150 dollar in cash, except the payment of the treasury stock as aforesaid, but was and is all clear gain to said defendant.

That plaintiff is further informed and verily believes that the statements and representations of said defendant in respect to the quantity and value of the ore on the dump in said mine were grossly and intentionally exaggerated, false and fraudulent, and plaintiff is further informed and verily believes that the said defendant, before receiving plaintiff's
151 money, was informed by telegram that the said mine was not a substantial and good one, but was a bad mine to invest money in.

That all of those statements and representations as aforesaid made by said defendant to this plaintiff were known to be false and unfounded in fact by the said defendant at the time they were made, and that the same were fraudulently made to plaintiff to induce plaintiff to part with his money and to make the payments aforementioned.

152 Plaintiff further shows that, after considerable money had been expended in working and developing the said mine, the result reached was that it was a failure and it would not pay to work, and the representations of said Fisk concerning the quality and quantity of said ore in and about said mine were exaggerated, fraudulent and false.

FOURTH. That by reason of the premises the plaintiff was induced to pay to said defendant at the various times above mentioned and suffered damage in the aggregate sum of $63,250. 153

Wherefore plaintiff demands judgment against said defendant for the sum of $63,250, with interest on the sum of $5,000 from the 4th day of December, 1879; with interest on the sum of $8,750 from the 6th day of July, 1880; with interest on the sum of $25,000 from the 11th day of February, 1880; 154 with interest on the sum of $12,000 from the 27th day of February, 1880, and with interest on the sum of $12,500 from the 25th day of September, 1880, together with the costs and disbursements of this action.

Dated New York, April 19th, 1882.

JOHN R. DOS PASSOS,
Plaintiff's Attorney,
Office and Post-office Address,
No. 29 Wall street, 155
N. Y.

CITY AND COUNTY OF NEW YORK, ss.:

FRANCIS A. FOGG, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that the foregoing complaint is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters that he believes it to be true.

(Sgd.) FRANCIS A. FOGG. 156

Sworn to before me this 21st day of April, 1882.

CHRISTIAN ZABRISKIE,
Notary Public, N. Y. Co.

(ENDORSED:)

N. Y. Supreme Court. Francis A. Fogg, Plain-

157 tiff, vs. Clinton B. Fisk, Defendant. Copy Complaint. John R. Dos Passos, Plaintiff's Attorney, 29 Wall street, N. Y.

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SUPREME COURT,

COUNTY OF NEW YORK.

158

FRANCIS A. FOGG,
Plaintiff,

AGAINST

CLINTON B. FISK,
Defendant.

159 The defendant, Clinton B. Fisk, for answer to the first cause of action stated in the complaint herein, denies generally and specifically each and every allegation in the first cause of action contained.

Defendant further answering says that, at about the time in the complaint alleged, the firm of Clinton B. Fisk & Co., composed of defendant and Colin F. Mackenzie and John T. Williams, sold plaintiff one thousand shares of the capital stock of the Mack Morris Mining Company at five dollars per share.
160 That said sale was at plaintiff's solicitation, and without any statement or representation by defendant to plaintiff whatever.

And said defendant, answering the second cause of action stated in said complaint, respectfully shows to this Court:

Defendant denies that, in the month of February, 1880, or at any other time or at all, this defendant

approached the plaintiff in relation to certain mining stocks, and offered to sell plaintiff stock in a certain company called The Golden Eagle Mining Company. 161

Defendant denies that, in respect to said mine or said mining company or stock in said mining company, defendant made all or any of the representations in said complaint stated or otherwise, and denies that defendant made any representations whatever to the plaintiff regarding said mining company or said mine, or the stock in said mining company. 162

And defendant denies generally and specifically each and every allegation in said complaint contained in respect to representations or statements alleged to have been made by this defendant to said plaintiff in respect to said mine or mines, or said mining company, or stock in said mining company.

Defendant denies that it has ever been found that working said mine would not pay, that the same could not be profitably worked. 163

Defendant denies that he has collected or received large or any sums of money from the original or any subscribers to the stock of said mining company, except that to defendant as an officer of the said company, certain sums as subscriptions were paid by certain subscribers to the said stock of the said company, which said sums were received by the said company.

Defendant, further answering, says that the amount paid by the said company for the said mine to the persons from whom the same was purchased was the sum of dollars. 164

And defendant further says that plaintiff, prior to his purchase of any of the stock, was fully advised of the amount which had been paid by the said company for the said mine, and was fully advised in

165 respect to all property conveyed in consideration of the payment of the said sum.

Defendant denies that the stock in the said company subscribed for by defendant did not cost defendant anything. On the contrary, defendant alleges that the same cost defendant more than the sum of two dollars per share.

Defendant, further answering, denies that he ever sold plaintiff the shares in said mine, as in the said second count in said complaint alleged, or any shares
166 therein. On the contrary, defendant avers that plaintiff sought defendant and asked defendant to procure for him certain shares in said mine, and that, pursuant to the request of the plaintiff, defendant did purchase from another party shares of stock in said mine at the price of two dollars and fifty cents ($2.50) a share, and delivered the same to the plaintiff at the same price which defendant had paid for the same. That the said stock so purchased by defendant and delivered to the plaintiff amounted to
167 twenty-five hundred shares, and that said twenty-five hundred shares are the only shares of said stock which defendant ever obtained in any way for this plaintiff.

Defendant, further answering, denies that any statement of defendant in respect to said mine or said mining company, or the shares of stock in said mining company was false or fraudulent.

Defendant denies that plaintiff purchased the stock in the second cause of action referred to in re-
168 liance, or that in such purchases plaintiff relied on any statements or representations of defendant, as in said cause of action alleged, or otherwise or at all. On the contrary, defendant alleges that plaintiff bought his stock after full inquiry, and relying solely on his own investigation and information.

Defendant further says that the plaintiff had full, actual and perfect knowledge of all the facts in re-

lation to the purchase of said mine and mines, and 169
the organization of the company thereon at the time
of and prior to his said purchase of said stock.

For answer to the third cause of action in said complaint stated this defendant says:

Defendant denies that he ever approached plaintiff or requested plaintiff to join defendant in the purchase of the mine known as The Silver Era Mine, in said third cause of action referred to.

Defendant denies that he represented to plaintiff that said mine was a most wonderful one, or that it 170
produced from seventy-five thousand to eighty thousand dollars or any other sum, or that there was ore on the dump ready for the mill worth more than enough to repay the whole purchase money or seventy-five thousand dollars, or any representations in respect to said ore, and denies that he represented to plaintiff that defendant had thoroughly investigated the said mine or had investigated it at all, or that it was one of the best mines in the district, or that the ore taken from the said mine averaged from 171
forty to fifty dollars per ton.

Defendant denies that he made all or any one, or part of the said alleged representations or statements to the plaintiff.

Defendant denies that he represented that defendant had sold gas or other stocks in order to invest the money realized from the same in said mine, and denies that he represented or stated to said plaintiff that defendant had invested eighty-five hundred dollars or any other sum of the money of defendant's 172
son in said mine.

Defendant denies that he stated or represented to the plaintiff that the lowest figure at which the mine could be purchased was seventy-five thousand shares of stock in a company to be formed with a capital of ten million dollars divided into one hundred thousand shares of one dollar each.

173 Defendant denies that he informed plaintiff that he wished plaintiff to purchase one quarter of fifty thousand shares for the sum of twenty-five thousand dollars cash or any other sum, and denies that he said that if plaintiff would do so this defendant would also put in twenty-five thousand dollars in cash or any other sum and take a quarter interest or any interest in said mine.

Defendant denies that he said that he wanted plaintiff to become president of the company, denies
174 that he said that by this joint investment of twenty-five thousand dollars each plaintiff and defendant would become owners of one half of the controlling interest, denies that he made the statement in said complaint alleged as to the manner in which the balance of the said stock should be sold, or any other statement in respect thereto.

Defendant denies that he represented to plaintiff that the object of the division of said stock, as in said third cause of action alleged, was to procure
175 the sum of seventy-five thousand dollars in cash, to be used as purchase money for said mine, and twenty-five thousand dollars for working capital.

Defendant denies that plaintiff made any investments or paid any money in said mine, or in said mining company, or for said shares as in said third cause of action alleged, or otherwise, in reliance on said or any representations of defendant, and denies that, in making the payments in said third cause of action alleged, plaintiff relied on said or any
176 statements or representations of defendant.

In fact, thirteen thousand seven hundred and fifty shares of said stock in said mine were given or paid to the firm of Clinton B. Fisk & Co., of which defendant was a member, as compensation or brokerage for placing or selling said mine. That plaintiff was well aware of said fact. That all other stock

in said mine held or owned by defendant, or his said firm was paid for, as plaintiff well knew. 177

Defendant further says that, at the time said mine was offered for sale, plaintiff was fully informed of the precise and actual terms of the sale thereof by the owners of said company.

Defendant further says that the fact is, that plaintiff, with full knowledge of all the facts with regard to said mine, and the price paid for it, came to defendant, and begged to be allowed to take the stock in said company. 178

Defendant denies that he made any false or fraudulent or exaggerated statements or representations to plaintiff, as in said third cause of action alleged, or otherwise, or at all, with the design of inducing plaintiff to part with his money, or to make the payments in said third cause of action alleged, or with any other design, or at all, and denies that he made any statements or representations to plaintiff, as in said complaint alleged, or otherwise, or at all. 179

Wherefore, defendant demands that said complaint be dismissed with costs.

MILLER, PECKHAM & DIXON,
Attorneys for Defendant.

Office address,
29 Wall street,
New York.

180

CITY AND COUNTY OF NEW YORK, ss.:

CLINTON B. FISK, being duly sworn, says that he is the defendant herein; that the foregoing answer is true, to the knowledge of the deponent, except as to the matters therein stated to be alleged on in-

181 information and belief, and that as to that matters he believes it to be true.

CLINTON B. FISK.

Sworn to before me, May 11th, 1882.

DANL. SEYMOUR,
Notary Public,
N. Y. Co.

182 [ENDORSED:]

N. Y. Supreme Court. Francis A. Fogg, plaintiff, against Clinton B. Fisk, defendant. Answer.

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183 SUPREME COURT,

COUNTY OF NEW YORK.

FRANCIS A. FOGG,
Plaintiff,

AGAINST

184 CLINTON B. FISK,
Defendant.

Notice of Appearance.

SIR--Please to take notice, that the defendant appears in this action, and that we are retained as attorneys for him therein, and demand that a copy of the complaint, and all papers in this action, be

served on us at our office, number 29 Wall street, 185
New York.

New York, April 12, 1882.

Yours, &c.,

MILLER, PECKHAM & DIXON,
Attorneys for Defendant,
No. 29 Wall street, N. Y.

To JOHN R. DOS PASSOS, ESQ.,
Plaintiff's Attorney,
No. 29 Wall street, N. Y.

186

[ENDORSED:]

Supreme Court. Francis A. Fogg agst. Clinton B. Fisk. Notice of appearance of defendant. Miller, Peckham & Dixon, attorneys for defendant. To John R. Dos Passos, plaintiff's attorney, 29 Wall street, N. Y. City. Recd. April 12, 1882.

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187

NEW YORK SUPREME COURT,

CITY AND COUNTY OF NEW YORK.

FRANCIS A. FOGG,
Plaintiff,

AGAINST

CLINTON B. FISK,
Defendant.

Notice of Trial.

188

SIR—Please to take notice that the above entitled action will be brought on for trial, and a motion made to dismiss the complaint therein at a Circuit Court, appointed to be held in and for the City and

County of New York, at the Court House in the said City, on the first Monday of June, 1882, at the opening of the Court on that day, or as soon thereafter as counsel can be heard.

Dated the 19th day of May, 1882.

Yours, &c.,

MILLER, PECKHAM & DIXON,
Attorneys for Defendant,
29 Wall street, N. Y.

To JOHN R. DOS PASSOS, ESQ.,
Attorney for Plaintiff,
29 Wall street, N. Y.

[ENDORSED:]

N. Y. Supreme Court, City and County of New York. Francis A. Fogg against Clinton B. Fisk. Notice of trial for June Term, 1882. Miller, Peckham & Dixon, defendant's attorneys, 29 Wall street, N. Y. Recd. May 19. To John R. Dos Passos, Esq., attorney for plaintiff, 29 Wall street, N. Y.

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N. Y. SUPREME COURT.

FRANCIS A. FOGG,
Plaintiff,

AGAINST

CLINTON B. FISK,
Defendant.

Notice of Trial.

Please to take notice that the issues of fact in this action will be brought to trial and an inquest taken

therein at the next Circuit Court, appointed to be held in and for the City and County of New York, at the New County Court House in the said City of New York, on the first Monday of June, 1882, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard. 193

Dated the 18th day of May, 1882.

Yours, &c.,

JOHN R. DOS PASSOS,
Attorney for Plaintiff,
29 Wall street, N. Y. 194

To MILLER, PECKHAM & DIXON,
Attorneys for Defendant.

[ENDORSED:]

N. Y. Supreme Court. Francis A. Fogg, plaintiff, against Clinton B. Fisk, defendant. Notice of trial. John R. Dos Passos, attorney for plaintiff. Due and timely service of a notice of which the within is a copy, is hereby admitted this 19th day of May, 1882. Miller, Peckham & Dixon, attorneys for defendant. 195

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SUPREME COURT,
N. Y. COUNTY.

| | |
|---|---|
| FRANCIS A. FOGG,<br>Plaintiff,<br><br>AGAINST<br><br>CLINTON B. FISK,<br>Defendant. | At Chambers,<br>January 12, 1883. |

196

It appearing to my satisfaction by the annexed

affidavit of the plaintiff, Francis A. Fogg, that the examination and testimony of Clinton B. Fisk, the defendant, relative to the issues herein, before the trial of this action are material and necessary to the plaintiff for the prosecution and trial of said action. Now, on motion of John R. Dos Passos, attorney for the plaintiff, it is

Ordered, that the defendant, Clinton B. Fisk, be examined and his testimony and deposition taken as a party before trial, pursuant to sections 870, 871, 872, 873, &c., of the Code of Civil Procedure, and that for such purpose he personally be and attend before the undersigned, a Justice of this Court, at the Chambers thereof, to be held in the New County Court House in the said City of New York, on the 31st day of January, 1883, at 11 o'clock in the forenoon of that day.

And I further order and direct that service of a copy of this order and of the affidavit of Francis A. Fogg, the plaintiff, be served upon the attorneys for the defendant, Miller, Peckham & Dixon, and upon the defendant, Clinton B. Fisk, and that service of the same upon said parties on or before the 25th day of January, 1883, be deemed sufficient.

GEO. C. BARRETT,
J. S. C.

[ENDORSED:]

N. Y. Supreme Court. Francis A. Fogg agst. Clinton B. Fisk. (Copy) Order for the examination of deft. before trial.

SUPREME COURT, 201
N. Y. COUNTY.

FRANCIS A. FOGG,
Plaintiff,

AGAINST

CLINTON B. FISK,
Defendant. 202

CITY AND COUNTY OF NEW YORK, ss.:

FRANCIS A. FOGG, being duly sworn, upon information and belief, says that he is the plaintiff in this action, and that deponent desires to examine the said defendant, Clinton B. Fisk, as a party before the trial of this action.

I. That the names and residences of all the parties to this action are as follows: 203

The plaintiff herein is Francis A. Fogg, who resides at No. 33 West Sixty-fourth street in the City of New York, and the defendant herein is Clinton B. Fisk, who, as deponent is informed and believes, resides at the Navarro Apartment House, Seventh avenue and Fifty-seventh street in said City, and has a place of business in the Mills Building. That the plaintiff herein has appeared by his attorney, John R. Dos Passos, whose office address is No. 29 Wall street in the City of New York, and that the said defendant has appeared by his attorneys, Miller, Peckham & Dixon, whose office address is No. 29 Wall street in the said City. 204

II. That the nature of this action is as follows: The said action is brought against the defendant upon three distinct causes of action to recover the

205 sum of $63,250 paid to the defendant between the 1st day of December, 1879, and September , 1880, upon certain alleged false and fraudulent representations and statements made by the defendant to the plaintiff, and upon which the plaintiff was induced to and did purchase of the said defendant, at his request and solicitation, mining shares or stocks and did pay for the same to the defendant the said aggregate sum of $63,250.

That such alleged false and fraudulent representa-
206 tions and statements, upon which plaintiff was induced to and did purchase said stocks, were substantially as follows, to wit: Under the first cause of action, that the said defendant stated and represented to plaintiff that he was interested in a mining company called "The Mack Morris Mining Company;" that the defendant owned 12,500 shares of the stock of the said company, for which he had paid $50,000, or at the rate of $4 per share, in cash, and that the said defendant, at and before the time of
207 the purchase of stock in said company, upon several occasions assured plaintiff, and represented to him as an inducement to purchase said stock, that the actual cash basis or bottom price for the stock was $4 per share, and that $200,000 in cash had been paid for said mine, of which the owners had left $30,000 in the treasury as a working capital, together with 49,000 shares of stock, and that his own stock had actually cost him $4 per share in hard cash, and that he had not only put and paid his own
208 money into the company, but also that of his relatives. The defendant further represented to the plaintiff that no stock could be purchased at $4 per share, but that he could obtain for and deliver to plaintiff 1,000 shares at a trifle over that figure.

That thereupon plaintiff, on or about the 4th day of December, 1879, agreed to take and purchase 1,000 shares of said stock from defendant, he offer-

ing to secure plaintiff said stock at $5 per share 209
without commission. That in such transaction, as
plaintiff is informed and believes, the said defendant
was acting as the agent of one Fordyce H. Rogers,
in the sale of the 1,000 shares which were subse-
quently delivered to plaintiff pursuant to said agree-
ment; that the defendant informed Rogers he could
only get $4 per share for the stock, and that he re-
ceived the stock from Rogers at that figure and price,
and obtained from him for so doing a commission
of $250, and immediately afterwards delivered the 210
stock to plaintiff at $5 per share, thus realizing a
profit of $1,250.

The statement made to this deponent by said de-
fendant, that he had invested $50,000 in cash, and
that the stock cost said Fisk at the rate of $4 per
share, and that he could not obtain the stock at less
than $5 per share, I am informed by his former
partner, Mr. John T. Williams, and verily believe
were false and unfounded in fact; but they were
well known to be so by him at the time they were 211
so made by said Fisk, and that such statements or
representations were fraudulently made with the
purpose and intent to induce plaintiff to purchase
1,000 shares of stock from him, and that he, Fisk,
individually, did not invest one dollar in the com-
pany. His stock not only did not cost him $4 per
share, but was actually received by him for nothing.

This deponent further states upon like informa-
tion from the said Williams, and which he verily
believes, that the statement that the said mine cost 212
$400,000, of which $200,000 was paid in cash to the
owners thereof, is false; that in fact not more than
the sum of $130,000 in cash, or thereabouts, was
paid for the said Mack Morris Mine; that said de-
fendant made other representations which this de-
ponent is informed by said Williams, and verily
believes, were false and fraudulent, by reason of

213 which the plaintiff was induced to and did purchase from said defendant 3,500 shares in another mining company known as the Golden Eagle Mining Company; that said transactions in relation to the Golden Eagle Mining Company forms the second cause of action against said defendant, and is as follows: That at the City of New York, about the month of February, 1880, the said Fisk again approached this plaintiff and made certain representations and statements in relation to said mine, to the effect
214 that said mine was located in Arizona; that he had seen the property; that there were many thousands of dollars worth of gold ore in sight; that this was equivalent to $200,000 dividends; that the mines of the company were the finest on Pacific coast; that a company had been organized with a capital of $10,000,000; that the controlling interest or 51,000 shares had been paid for in cash, and that he (Fisk) had actually invested as his proportion of the said 51,000 shares the sum of $25,000
215 in cash; that said $100,000 was to be paid as follows: namely $100,000 was to be paid to the owners of the mine, of which they agreed to leave $40,000 for the use of the treasury as a working capital, and 49,000 shares of the capital stock of the company, which was to be the full consideration of the property.

That as a further inducement to plaintiff to purchase the stock of said company and to become interested in the said company, the said defendant rep-
216 resented to plaintiff that $2 per share was the actual price which the stock had cost him; that it was the bottom price; that he could procure some stock for plaintiff at not less than $2.50 per share, which was only fifty cents per share above the actual cost price; but believing in and relying upon said representations, the plaintiff purchased from the said Fisk, between the 13th of February and the 6th of

July, 18 0, 3,500 shares of said stock, for which 217
plaintiff paid the said defendant the sum of $8,750.
Deponent further says that after said mine had been
worked about a year or thereabouts, it was found to
be worthless, and that not a dollar was ever realized
from the property of the company for the benefit of
the stockholders. Deponent further alleges upon
information and belief that the said Fisk collected
and received large sums of money from the original
subscribers to the stock of the said Golden Eagle
Mining Company, that the principal part of the busi- 218
ness appertaining to the purchase of the property
was transacted by the defendant Fisk in person,
and through his son Charles H. Fisk, who was in
Arizona at the place where the mine was situated.
Upon like information and belief, this deponent al-
leges that the said defendant did not pay for the
property or mines of the Golden Eagle Mining Com-
pany, or for a controlling interest in the same, the
sum of $60,000, but on the contrary, the said Fisk
only paid for the mines which became the prop- 219
erty of said company a sum not exceeding $35,000;
and in that sum were included not only the Golden
Eagle, but two other mines, namely, the Gold Hill
and Iowa, which were not conveyed to the com-
pany, but were held as the property or under the
control of said Fisk.

That the original stock subscribed for by said Fisk
did not cost him anything, but, on the contrary, said
Fisk received the same for nothing and made a clear
profit of $10,000 and upwards out of the transaction. 220
That the transaction had by the plaintiff herein with
defendant in relation to the Silver Era Mining Com-
pany forms the third cause of action against said
defendant.

That at the City of New York, in the early part
of February, 1880, the said defendant again ap-
proached this plaintiff and asked and requested

221 plaintiff to join with him in the purchase of a certain mine known as the Silver Era Mine, located in Arizona Territory, that the said defendant thereupon represented and stated to the plaintiff that the Silver Era Mine was a most wonderful one, that it had already produced from $70,000 to $80,000; that there was ore on the dump ready for a mill worth more than enough to repay the whole purchase money of $75,000; that he had investigated it thoroughly himself and that it was one of the best
222 mines in the district, and that the ore taken from said averaged from $40 to $50 per ton.

The said Fisk further represented that for the purpose of raising money to go into the enterprise he had sold gas and other stocks which had been held a long time in his family, and subsequently represented and stated that he had invested $8,500 of the money of his own in the mine.

The said defendant further represented to this plaintiff that the lowest figure at which the mine
223 could be purchased was $75,000 in cash and 35,000 shares of stock in a company to be formed with a capital of $10,000,000, divided into 100,000 shares of $100 each; that he informed plaintiff that he wished plaintiff to purchase one-quarter of 55,000 shares, viz.: 13,750 shares in said company for the sum of $25,000 cash, and that if plaintiff would do so he, the said Fisk, would also put in $25,000 cash and take one-quarter interest in the mine; and he wanted plaintiff to become president of the com-
224 pany, and that by this joint investment of $25,000 each, the plaintiff and said defendant would become owners of one-half of the controlling interest; that the balance of the stock to the extent of one-quarter thereof should be sold to raise the sum of $25,000 to make up the purchase money to pay for the mine, and the remaining quarter to be held in the treasury for working capital; that in

pursuance of the plan of said Fisk a corporation 225
was formed under the laws of the State of New York, called the Silver Era Mining Company, with a capital of $10,000,000, divided into 100,000 shares of the par value of $100 each, of which the plaintiff became president, the said defendant treasurer and one John T. Williams, then a partner with said Fisk, secretary.

The plaintiff further says, that believing in and relying upon all of the representations and statements of said defendant in relation of said mine, as 226
above set forth, he was induced to and did pay to the said C. B. Fisk the sum of $25,000 for 13,750 shares of the stock of said company; and on or about the 27th day of February, 1880, to make an additional payment of $12,000 to said Fisk for 6,600 shares of stock of said company, being $\frac{12}{25}$ths of the said stock of the company held for sale; and on or about the 25th day of September, 1880, respectively, plaintiff made additional payments to said defendant as treasurer of said company, 227
amounting in the aggregate to $12,500 for 6,875 shares of the treasury stock of said company. That each of the payments of money that plaintiff made to said defendant, as aforesaid, was made by plaintiff upon the express representation and statement of said Fisk that he was contributing, paying towards the purchase of and investing his own money in the said mine and company to the same extent, in actual cash, as plaintiff put in, and he many times subsequently informed plaintiff that the said 228
money had all been put in by him, and that his own and plaintiff's funds had been deposited in the Shoe and Leather Bank of the City of New York, and that he, the said defendant, had actually checked out from the funds so deposited in said bank the sum of $75,000 in payment of said mine; that of this last-named amount the said de-

229 fendant had paid one H. S. Sanders, one of the owners of the property, the sum of $40,000 in cash.

That with an exception, viz., the payment by said defendant of his property of the treasury stock, which was not in substance a payment of his own money, this deponent is informed by said Williams and said H. S. Sanders, and verily believes that all of the said statements and representations of said defendant to plaintiff, and upon the faith of which plaintiff was induced to make to defendant the pay-
230 ments aforesaid, were false and unfounded; that the said mine or property of the said defendant for the sum of $75,000 in cash; that the said Fisk did not directly or indirectly contribute or pay the sum of $25,000 in cash for one quarter of the 55,000 shares of stock, or any sum in cash, and that he did not invest a single dollar in cash of his own money in the whole enterprise; that on the contrary the said Fisk did not pay for said mine a sum exceeding $46,667 in cash, and whatever may be the said Fisk
231 used in the purchase of the said mine or property was obtained from the plaintiff and from the sale of stock to other parties by the said defendant, and that the said Fisk's stock in said company did not cost him one dollar in cash, except the payment of the treasury stock aforesaid; but was and is all clear gain to defendant.

The plaintiff is further informed by said Williams, and verily believes that the statements and representations of said defendant in respect to the
232 quantity and value of the ore on the dump in said mine were grossly and intentionally exaggerated, false and fraudulent; and plaintiff is further informed by said Williams, and verily believes that the said defendant, before receiving plaintiff's money, was informed by telegram that said mine was not a substantial and good one, but was a bad mine to invest money in.

III. That the substance of the judgment demanded in this action is that by reason of the said false and fraudulent representations the plaintiff may recover of said defendant the money paid to him by reason of the same, to wit, the sum of $63,251. 233

IV. That the defendant herein on the 13th day of May, 1882, interposed an answer to the complaint, and that the nature of the defense set up by said defendant in said answer is substantially as follows: 234

The said defendant denies generally and specifically each and every allegation in the cause of action, and alleges that the stock in said cause of action was sold to the plaintiff by the firm of Clinton B. Fisk & Co. at $4 per share.

As to the said second cause of action in the complaint contained, the defendant denies that he ever approached plaintiff and offered to sell him the stock of the Golden Eagle Mining Co., or that he made any or all of the representations in said complaint stated, and that the plaintiff bought all of said stocks upon his own investigations, and the said defendant, as to the remaining cause of action, substantially interposes a general denial to the same. 235

This deponent further shows that the person to be examined in this action before the trial thereof is the defendant herein, Clinton B. Fisk, as aforesaid, and that the defendant's place of residence is at the Navarro Apartment House, Seventh avenue and Fifty-seventh street, in the City of New York, and that the plaintiff desires to examine him in said city. That, as deponent is advised by his counsel herein and verily believes, the examination and testimony of said defendant Fisk, relative to the issues herein, are both material and necessary to the plaintiff for the prosecution of this action and 236

237 for the trial thereof. That its materiality and necessity appear from these facts. That the said Fisk had full charge or control of the negotiations and purchases of the different mines hereinbefore referred to from the original owners or proprietors; that he paid the money or purchase price therefor, and is fully cognizant of all that took place on these occasions, and that he consequently knows the actual price paid therefor, how and in what form it was paid, whether in checks or money or otherwise, and
238 the circumstances under which each transaction was made; that the said Fisk has, as deponent is informed by the said Williams heretofore mentioned and verily believes the same, possession of papers and documents which disclose or tend to disclose the actual facts surrounding the purchase of the mines of the three different companies above referred to.

This deponent further alleges that the said Fisk had the general management of the sale and issuing of stock to deponent and to others of the stockhold-
239 ers; that he knows the actual cost price of the same and the time, place and circumstances under which all of the stock was issued both to deponent and the other stockholders.

Deponent further says that the said Fisk personally visited the several mines above referred to and obtained a knowledge of the character and extent of the same, and that said Fisk has the possession of several telegrams and letters from persons unknown to this deponent, fully informing him as to said
240 mines, and deponent is informed by said Williams, and verily believes the statement, that one of the said telegrams in the possession or under the control of the said Fisk will show that before the said Fisk had received any money from this deponent on account of the Silver Era Mine, the subject matter of the third cause of action herein, he was informed in

substance that the said mine was not a good one to 241
invest money in.

That the materiality and necessity of the examination of defendant further appears from this. Defendant conducted in person all the negotiations relative to the original purchases of the mines; he paid the purchase money; he knows the actual cost price of the same; he has possession of material papers and documents relating to the sale; he has possession of his own private books of account and check books which would serve to show the actual 242
transactions and the cost price of the stock that plaintiff owned in the said companies, and he knows exactly how much his own stock cost.

Deponent further says that no previous application has been made for this order.

F. A. Fogg.

Sworn to before me
this 12th day of
January, 1883.

C. T. Arthur,
Notary Public,
Kings Co., N. Y. 243

Ctf. N. Y. Co.

244

245 At a Special Term of the Supreme Court held at the Chambers thereof at the New County Court House, in the City of New York, on the 20th day of February, 1883.

Present—Hon. Charles Donohue, Justice.

Francis A. Fogg,
246 Plaintiff,

against

Clinton B. Fisk,
Defendant.

An order having been heretofore made in this action to take the examination and deposition upon be-
247 half of the plaintiff before the trial hereof, returnable by adjournment on the 14th day of February, 1883, at the Chambers of this Court, and the said defendant having on the said last named day moved to vacate and set aside said order upon the ground that the affidavit of F. A. Fogg thereto annexed, and upon which the same was granted, was irregular and insufficient; after hearing Wheeler H. Peckham, Esq., in favor of said motion, and John R. Dos Passos, Esq., for the defendant, in opposition
248 thereto, and after reading said last named order and affidavit it is

Ordered, that the said motion be and the same is hereby denied, and the said defendant is hereby directed and required to be and attend before the undersigned at the Chambers thereof, at the New County Court House, in the City of New York, on the 27th day of February, 1883, at 10:30, in the fore-

noon of that day, for the purposes of said examination. 249

(Sgd), C. DONOHUE.

[ENDORSED]:

N. Y. Supreme Court. Francis A. Fogg, plaintiff, against Clinton B. Fisk, defendant. Copy. Order denying motion to vacate order for examination of defendant and notice. John R. Dos Passos, Drexel Building, No. 29 Wall st., N. Y., attorney for plaintiff. Due service of copy of within notice is hereby admitted. Dated N. Y., Feby. 26, 1883. Miller, Peckham & Dixon, attorneys for defendant. Take notice that the within is a copy of an order this day entered and filed in this action in the office of the clerk of this Court, dated February 24, 1883. John R. Dos Passos, attorney for plaintiff, No. 29 Wall st., N. Y. Miller, Peckham & Dixon, Defendant's attorneys. 250

251

OPINION.

DONOHUE, J.:

I think the affidavit is sufficient.

252

253 SUPREME COURT,

NEW YORK COUNTY.

FRANCIS A. FOGG,
Plaintiff,

AGAINST

CLINTON B. FISK,
254 Defendant.

Please take notice that the defendant herein appeals to the General Term of this Court from the order herein entered in the office of the Clerk of this Court on the 24th day of February, 1883.

February 25th, 1883.

MILLER, PECKHAM & DIXON,
Attorneys for Defendant,
255 29 Wall St., N. Y.

Due service of the within notice is hereby admitted.

JOHN R. DOS PASSOS,
Attorney for Plaintiff.

256

At a General Term of the Supreme Court, held in and for the First Department, at the New County Court House in the City of New York, on the first day of June, 1883. 257

Present—Hon. Noah Davis, C. J.; Hon. John R. Brady, Hon. Charles Daniels, J. J.

Francis A. Fogg,
Plaintiff and Respondent, 258

against

Clinton B. Fisk,
Defendant and Appellant.

The appeal from the order of Mr. Justice Donohue, entered in this action on the 25th day of February, 1883, denying a motion made by the defendant 259 to vacate an order made herein on the 12th day of January, 1883, requiring the said defendant to appear for examination before trial pursuant to sections 870, 871, 872, &c., of the Code of Civil Procedure, having been duly heard at the General Term of this Court,

It is now on motion of John R. Dos Passos, attorney for respondent, after hearing Miller, Peckham & Dixon, attorneys for the appellant,

Ordered and adjudged that the said order denying 260 the motion to vacate the order for the examination of the defendant be and the same is hereby affirmed with $10 costs and disbursements of this appeal, to the respondent.

N. D.

[Endorsed:]

Supreme Court, General Term. Francis A. Fogg,

plaintiff and respondent, against Clinton B. Fisk, defendant and appellant. Copy order of affirmance. John R. Dos Passos, Drexel Building, No. 29 Wall street, N. Y., attorney for plaintiff. Due service of copy of within order and notice is hereby admitted. Dated N. Y., June 7, 1883. Miller, Peckham & Dixon, attorneys for defendant. Take notice that an order of which the within is a copy, was this day entered and filed in the office of the Clerk of this Court, dated June 6, 1883. John R. Dos Passos,
262 plaintiff's attorney, 29 Wall street, N. Y., to Miller, Peckham & Dixon, Esqs., attorneys for defendant.

SUPREME COURT,
COUNTY OF NEW YORK.

FRANCIS A. FOGG,
Plaintiff, Respondent,

AGAINST

263

CLINTON B. FISK,
Defendant, Appellant.

SIR—Please take notice that the defendant herein appeals to the Court of Appeals from the order of the General Term of this Court, entered herein on the 5th day of June, 1883, affirming the order of the Special Term of this Court, entered herein on the 24th day of February, 1883.

264 Dated New York, June 6, 1883.

Yours, &c.,
MILLER, PECKHAM & DIXON,
Attorneys for Defendant, Appellant,
No. 29 Wall St., N. Y.

To JOHN R. DOS PASSOS, ESQ.,
Attorney for Plaintiff, Respondent.

PATRICK KEENAN,
Clerk.

[ENDORSED:] 265

Filed June 5, 1883.

Due and timely service of a copy of the within notice of appeil is hereby admitted.

Dated June 6, 1883.

JOHN R. DOS PASSOS,
Attorney for Plaintiff.

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266

At a Special Term of the Supreme Court, held at the New County Court House in the City of New York, on the 12th day of October, 1883.

Present—HON. GEORGE C. BARRETT, Justice.

FRANCIS A. FOGG,
Respondent, 267

AGAINST

CLINTON B. FISK,
Appellant.

The above named Clinton B. Fisk, having appealed to the Court of Appeals from the order of the General Term of this Court, entered herein on the 6th day of June, 1883, affirming an order made 268 herein on the 24th day of February, 1883, denying a motion made by the defendant Fisk to vacate and set aside an order for the examination of said Clinton B. Fisk before trial, entered in this action on the 12th day of January, 1883, and the said Court of Appeals having dismissed the appeal from the order of said General Term with costs.

269 Now, on reading and filing the remittitur from the Court of Appeals and on motion of John R. Dos Passos, Esq., attorney for respondent, it is

Ordered, that the judgment of the Court of Appeals dismissing said appeal, with costs, be and the same is hereby made the judgment of this Court.

Enter.

GEO. C. BARRETT,
J. S. C.

270 SIRS—Take notice that the remittitur herein was this day duly filed in the office of the Clerk of the City and County of New York, and that an order, of which the foregoing is a copy, was duly entered herein on said day, and duly filed in the office of said Clerk of the City and County of New York.

Dated New York, Oct. 12, 1883.

Yours, &c.,
JOHN R. DOS PASSOS,
Atty. for Respondents,
271 29 Wall St.,
N. Y. City.

TO MILLER, PECKHAM & DIXON, ESQ.,
Attys. for Appllt.

[ENDORSED:]

N. Y. Supreme Court. Francis A. Fogg, respdt., against Clinton B. Fisk, applt. (Copy) Order on
272 remittitur dismissing appeal and notice. Dos Passos Brothers, attorneys for respondent, 29 Wall St., New York. N. Y., October 13, 1883. Miller, Peckham & Dixon, attys. for deft., applt.

SUPREME COURT, 273

NEW YORK COUNTY.

FRANCIS A. FOGG,
Plaintiff,

AGAINST

CLINTON B. FISK,
Defendant. 274

The defendant, Clinton B. Fisk, having appealed to the Court of Appeals from the order of the General Term of this Court, entered in this action on the 6th day of June, 1883, and the Court of Appeals having dismissed the said appeal with costs, and the judgment of the Court of Appeals having been made the judgment of this Court, by order entered herein on the 13th day of October, 1883, and the costs and 275
disbursements of the plaintiff herein in the Court of Appeals having been on notice and appearance of the parties taxed by the Clerk at the sum of $112.28 dollars,

Now, on motion of John R. Dos Passos, Esq., attorney for plaintiff, ordered and adjudged that the plaintiff, Francis A. Fogg, have and recover judgment against said defendant, Clinton B. Fisk, for the sum one hundred and twelve dollars and twenty-eight cents costs and disbursements as afore- 276
said.

TO MILLER, PECKHAM & DIXON, ESQS.,
Deft's. Attys.

Take notice that a judgment, of which the above is a copy, was this day entered and filed in the office of the Clerk of the City and County of New York

277 against the defendant and in favor of the plaintiff for the sum of $112.28.

Dated N. Y., October 16, 1883.

DOS PASSOS BROS.,
Plff's. Attys.

[ENDORSED:]

N. Y. Supreme Court. Francis A. Fogg, plaintiff, against Clinton B. Fisk, defendant. Copy judgment for costs in Court of Appeals and notice
278 of entry. John R. Dos Passos, attorney for plaintiff, 29 Wall St. Due and timely service of a copy of the within is hereby admitted. N. Y., 16th Oct., 1883. Miller, Peckham & Dixon, attys. for applt., deft.

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SUPREME COURT,

279 COUNTY OF NEW YORK.

FRANCIS A. FOGG,
Plaintiff,

AGAINST

CLINTON B. FISK,
Defendant.

280 CITY AND COUNTY OF NEW YORK, SS.:

CLINTON B. FISK, of said city, being duly sworn, says that he is the defendant herein; that an issue of fact was joined herein on the 12th day of May, 1883, by the service of defendant's answer herein; that this cause was duly noticed for trial by plaintiff and defendant for the first Monday in June, 1882;

that deponent has fully and fairly stated the case 281
in this cause to Wheeler H. Peckham, Esq., his
counsel therein, who resides at No. 685 Madison av-
enue, in said city, and has fully and fairly disclosed
to him the facts which he expects to prove by the
witness George B. Walker hereafter mentioned;
that deponent is advised by his said counsel after
such statement, and verily believes, that he has a
good and substantial defense to this action on the
merits thereof, and that said George B. Walker is a
material and necessary witness for deponent on the 282
trial of this action; that the said George B. Walker
resides in the City of San Francisco, California, and
at present is sojourning in London, England; that
this cause was reached for trial on the 4th day of
October, 1883, and by the plaintiff moved over the
term; that deponent is informed by his attorneys
that on or about the 23d day of October defendant's
attoneys asked plaintiff's attorney if he would con-
sent to the entry of an order for a commission to
issue herein to take the testimony of said Walker, 283
and plaintiff's attorney replied he would consent,
and on October 25th, 1883, defendant's attorneys
submitted to plaintiff's attorney the usual and proper
form of order for such commission with a consent
to the entry thereof; that plaintiff's attorney re-
tained said order and consent until November 3d,
1883, and then returned the same to defendant's at-
torneys without his consent to the entry thereof.

That said Walker is likely to leave London in a
few weeks to travel from place to place in Europe, 284
rendering it almost impossible to then ascertain
when and where to send a commission for his testi-
mony; that the testimony of said Walker is mate-
rial to the defendant in the defense of this action,
and unless the time for the hearing of the motion
for said commission be shortened by an order to
show cause, defendant fears that he will be unable

285 to obtain the testimony of said Walker in time for the trial of this action; that George Menzies Clements, counsellor-at-law, Gresham House, 24 Old Broad street, London, is a fit, proper and competent person to execute said commission.

That no previous application for the order now sought has been made.

CLINTON B. FISK.

Sworn to before me November 5th, 1883.

286 WM. HENRY KNOX,
Notary Public,
N. Y. Co.

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SUPREME COURT,

COUNTY OF NEW YORK.

287

FRANCIS A. FOGG,
Plaintiff,

AGAINST

CLINTON B. FISK,
Defendant.

Upon reading the pleadings and proceedings
288 herein and the affidavit of the defendant, verified November 5, 1883, on motion of Miller, Peckham & Dixon, attorneys for the defendant herein,

Ordered that the plaintiff or his attorney show cause before one of the Justices of this Court, at a Special Term thereof, to be held at Chambers in the County Court House in the City of New York, on the 7th day of November, 1883, at 11 o'clock in the

forenoon, or so soon thereafter as counsel can be heard, why an order should not be made directing a commission to issue in that action to George Menzies Clements, counsellor-at-law, of London, England, to examine under oath upon interrogatories to be annexed thereto, George B. Walker, a witness in behalf of the defendant, in which plaintiff shall be at liberty to join, and why defendant should not have such other and further relief as may be just; and on like motion, it is further ordered that service of said affidavit and of this order one day before it is returnable shall be a sufficient service. 289 290

Dated Chambers, Supreme Court, November 5, 1883.

C. DONOHUE,
J.

[ENDORSED:]

Supreme Court. Francis A. Fogg, plaintiff, against Clinton B. Fisk, defendant. Copy affidavit and order. Miller, Peckham & Dixon, 29 Wall street, Drexel Building, New York, attorneys for defendant. To John R. Dos Passos, Esq., attorney for plaintiff. 291

292

293 At a Special Term of the Supreme Court, held at the County Court House in the City of New York, on the 8th day of November, 1883.

Present—Hon. Charles Donohue, Justice.

Francis A. Fogg,
Plaintiff,

294 against

Clinton B. Fisk,
Defendant.

Upon reading and filing the order to show cause herein why a commission should not issue to take the testimony of George B. Walker, a witness on behalf of the defendant herein, and the affidavit of the defendant upon which the same was based, and 295 due proof of due service of said notice and affidavit, on motion of Miller, Peckham & Dixon, attorneys for the defendant, no one appearing to oppose,

Ordered that a commission issue in this action directed to George Menzies Clements, Esq., counsellor-at-law, of London, England, to examine under oath upon interrogatories to be annexed thereto, George B. Walker, sojourning in London, England, a witness on behalf of the defendant, and 296 that the plaintiff be at liberty to join in said commission.

(A copy.)

[L. S.] Patrick Keenan,
Clerk.

[Endorsed:]

Supreme Court. Francis A. Fogg against Clinton B. Fisk. Order. Miller, Peckham & Dixon,

attorneys for defendant, 29 Wall street, N. Y. To 297
John R. Dos Passos, Atty. for Plff., 3 Broad street.
Rec'd Nov. 9, 1883.

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SUPREME COURT

OF THE CITY AND COUNTY OF NEW YORK.

| | |
|---|---|
| FRANCIS A. FOGG<br>AGAINST<br>CLINTON B. FISK. | Before Hon. Geo. C. Barrett, Justice. |

298

OCTOBER 20, 1883.

Examination of defendant before trial.

299

APPEARANCES:

For Plaintiff, MR. DOS PASSOS.
For Defendant, MR. PECKHAM.

CLINTON B. FISKE, being duly sworn, testifies as follows:

BY MR. DOS PASSOS:

Q. You are the defendant in this action?
A. Yes.
Q. Were you a member of the firm of C. B. Fisk 300
& Co.?
A. I was.
Q. When?
A. In 1879 and 1880.
Q. Is that firm still in existence?
A. It is not.
Q. When was it dissolved?

301 A. I think on January 1, 1881.
Q. Who did it consist of?
A. C. F. McKenzie, J. T. Williams and myself.
Q. Did the firm voluntarily dissolve?
A. It did.
Q. Do you know the plaintiff in this action?
A. I do.
Q. How long have you known him?
A. I can't tell that. I should think four or five years.
302 Q. Were you ever connected with a mining company called the McMorris Mining Company?
A. Yes.
Q. In what capacity?
A. As its president.
Q. When was it formed?
A. In 1879.
Q. How long did you continue its president?
A. During the term of its existence.
Q. How long did it exist?
303 A. Three years, perhaps.
Q. Was it dissolved?
A. It was merged in another company.
Q. What company?
A. The La Platte Company.
Q. Does that company exist?
A. No, sir; it was merged with the McMorris Mining Company into their organization.
Q. It was called then the Del La Platte?
A. No, sir; the Hope.
304 Q. What has become of that company?

Objected to.

Q. Did you have any dealings with the plaintiff in this city in relation to the McMorris mining stock?
A. The firm of C. B. Fiske & Co. did. I did not individually.

Q. Did you ever have any transactions with him individually? 305

A. No, sir.

Q. In any way, manner or shape?

A. In no way, manner or shape; no, sir.

Q. Who represented C. B. Fiske in transactions with the plaintiff?

A. Chiefly J. T. Williams.

Q. Did you have any conversation with him?

A. Not much.

Q. Did you have any? 306

A. What sort do you mean?

Q. About the McMorris Mining Company's stock?

A. No, sir.

Q. You don't remember ever having had one conversation with him about stock?

A. In a general way we might have conversed about the stock of the mining company itself.

Q. What did the property of the McMorris Mining Company consist of?

307

Objected to.

A. It consisted of its mine.

Q. Where was the property located?

Objected to.

Q. Was McMorris Mining Company a corporation existing under the laws of New York?

A. It was.

308

Q. Did you negotiate for the purchase of the property of the McMorris Mining Company?

Objected to.

Q. Who did?

Objected to.

309 Counsel went before the Judge at Chambers on the questions objected to. The Court took the papers and reserved its decision.

Adjourned to Saturday, November 3, 1883, at 10:30 A. M.

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All the questions objected to are disallowed.
November 3, 1883.

310 GEORGE C. BARRETT,
Justice Supreme Court.

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N. Y. SUPREME COURT.

FRANCIS A. FOGG

311 AGAINST

CLINTON B. FISKE.

NOVEMBER 3, 1883.

The parties met pursuant to adjournment.

EXAMINATION OF CLINTON B. FISKE CONTINUED:

BY MR. DOS PASSOS:

312 Q. What was the consideration paid on the sale of the McMorris mine?

Objected to.

Q. To whom was the money paid?

Objected to.

Q. When? 313

Objected to.

Q. Where?

Objected to.

Q. State the circumstances attending the payment of the money?

Objected to. 364

At this point the counsel went before the Court at Chambers (Justice Donohue presiding), to be heard on the objections taken to the foregoing questions.

After hearing the arguments of the respective counsel, the Court took the papers and decision was reserved.

Adjourned to November 7, 1883, at 10:30 A. M. 315

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NEW YORK SUPREME COURT.

| | |
|---|---|
| FRANCIS A. FOGG<br>AGAINST<br>CLINTON B. FISKE. | Examination of defendant before trial. |

316

NEW YORK, Nov. 7, 1883.

Present—Counsel as before.

MR. DOS PASSOS:

Without waiving our rights to ask the questions which have been heretofore asked, we will proceed.

317 CLINTON B. FISKE'S examination resumed.

BY MR. DOS PASSOS:

Q. When did you first become connected with the McMorris Mining Company?

A. At its beginning.

Q. When was that?

A. I don't remember now.

Q. About?

A. Sometime in 1879.

318 Q. About what month?

A. I think the company was organized in November or December.

Q. You were one of the organizers?

A. Yes, sir.

Q. How many shares of stock did you subscribe for in the McMorris Mining Company?

A. I subscribed for, I think, 10,000.

Q. Where did you make your subscription?

A. I think in the National Shoe & Leather Bank.

319 Q. Where was the business of the McMorris Mining Company carried on?

A. Chiefly there; the Eastern business at this office.

Q. At what price did you subscribe?

A. About $4 per share.

Q. How much money did you pay in?

A. I paid in $40,000.

Q. In what form?

A. In money.

320 Q. In money?

A. Yes, sir.

Q. Do you mean actual money, in gold?

A. In gold and in checks on my firm, and in checks on Stout & Co., checks on the Shoe & Leather Bank. I cannot tell definitely as to whom they were on. I drew on different accounts and paid different drafts drawn on me.

Q. Where was this $40,000 paid? 321
A. Paid in Arizona and paid in New York.
Q. How much of it was paid in New York?
A. I cannot tell exactly; I should think over $20,000.
Q. About how much over $20,000?
A. I should think about $2,000.
Q. That is, about $22,000 was paid?
A. I should think so; yes, sir.
Q. How was that paid?
A. By these various checks I have named and by 322
drafts drawn on me by the party from whom we bought it.
Q. From whom had you bought it?
A. From M. A. Baldwin.
Q. Was the deed made from him to you?
A. No, sir; it was not.
Q. How was it made?
A. What deed?
Q. The deed—you say you bought it from M. A. Baldwin? 323
A. Yes, sir; it was deeded originally by the parties who owned the mine.
Q. To M. A. Baldwin?
A. No, sir.
Q. To whom?
A. To Mr. Stout, Mr. Navarro, and myself.
Q. Did Baldwin's name appear in the record at all?
A. In the deed? No, sir.
A. And then you deeded--the triumvirate of the 324
three of you—it to the company?
A. I don't remember whether we did or did not; I think we deeded it to somebody else and they deeded it to the company.
Q. This money that you paid in New York, this $22,000, was any of it paid in greenbacks or in gold?
A. I think not; I think it was all paid in checks—

325 some of it might have been paid in money to Baldwin when he was here. That I cannot tell you. If you will put in my possession all my books and papers in your hands I will tell you.

MR. DOS PASSOS: I have not got your books and papers.

WITNESS: Your people say you have.

Q. You paid $22,000. You think some of it was
326 in money, and I mean by money, some of it was in greenbacks and some in gold?

A. I did not say so.

Q. I want to know how the $22,000 was paid?

A. I have answered that, sir. I said I paid it in checks on these several sundry places, and money.

Q. You paid some of it in checks. By sundry places you mean in checks on the Shoe & Leather Bank, in checks on Clinton B. Fiske & Co., and in money?

327 A. Yes, sir.

Q. How much did you pay in money?

A. Some checks on Stout & Co.—that I could not tell you.

Q. To whom were these payments made?

A. Made to M. A. Baldwin.

Q. All to Baldwin?

A. All to Baldwin; yes, sir.

Q. You can't tell how much money was paid or what part of the $22,000 was paid in money?

328 A. No, I cannot, but I think it was over $22,000.

Q. Where was that payment made to him?

A. In my office, some of it; I think some of it at my house when he would want $100 or $200 and I would give it to him.

Q. You refer now to money payments?

A. Yes, sir.

Q. When were those payments made?

A. About the time of this and afterwards. 329

Q. That is, about the time of this and afterwards you mean about November, 1879?

A. From November on to the summer of 188 . It ran away through into 1880. Part of these moneys were paid in on working capital; they were paid directly to the treasurer of the company.

Q. Who was the treasurer of the company?

A. Mr. A. V. Stout.

Q. Now, you cannot say definitely what proportion of the $22,000 was paid in money? 330

A. No, sir.

Q. No more definitely than what you have answered?

A. No, sir.

Q. Let us go to the checks. How many checks or how much did you pay in checks on C. B. Fisk & Co.?

A. I could not tell you?

Q. About how much?

A. I would not say about now much, because I 331 have not the means in my possession of knowing.

Q. Was it $5,000?

A. I have told you; I have answered the question.

Q. Was it $5,000?

A. I don't know.

Q. Was it $10,000?

A. I don't know how much it was.

Q. Was it $15,000?

A. I don't know how much it was. 332

Q. About how much was it?

A. I don't know.

Q. In regard to the checks drawn on the Shoe & Leather Bank how much?

A. I don't know.

Q. Was it $1,000?

A. I don't know.

333 Q. Was it $5,000?
A. I don't know.
Q. Was it $10,000?
A. I don't know.
Q. Was it $15,000?
A. I don't know.
Q. Was it $20,000?
A. I think it was not 20,000.
Q. Was it 15,000?
A. I think it was not 15,000.
334 Q. Was it 10,000?
A. I don't know.
Q. Was it between ten and fifteen?
A. I don't know.
Q. How do you say that it was not 15—by what means?
A. I think I would not draw as much as that on that account.
Q. Did you keep an account in the Shoe & Leather Bank?
335 A. I did; yes, sir.
Q. In whose name?
A. My own.
Q. And you had your own check book?
A. Yes, sir.
Q. Does that check book show all the payments that you made on the Shoe & Leather Bank for the stock of this company?
A. That I don t know, whether it does or not.
Q. Have you not any idea did you keep two check
336 books?
A. Two check books on the Shoe & Leather Bank?
Q. Yes.
A. No, one; but drafts would be drawn on me from Arizona payable at the Shoe & Leather Bank, and my book would not show that.
Q. If you drew checks on the Shoe & Leather

Bank would they appear in the check book of the 337
Shoe & Leather Bank?

A. They undoubtedly would.

Q. Where is that check book?

A. I think in the possession of the Court; it was used in the other branch of this case and I think it is there yet.

Q. The drafts that you say you paid, who drew those drafts?

A. Baldwin drew some of them; some of them, I think, were drawn by my son. 338

Q. In regard to the McMorris mine?

A. Yes, sir.

Q. And upon whom were they drawn?

A. Drawn upon me.

Q. Individually?

A. Yes, sir.

Q. And payable where?

A. Well, I don't remember where payable; probably presented to me and paid at my office.

Q. And paid at your office? 339

A. Yes, sir.

Q. By your check?

A. No; they would be paid, I think, in the accounts of Clinton B. Fisk & Co.

Q. Would they be paid in any other way?

A. Well, they might be.

Q. Are not you certain about that?

A. No, sir; I am not.

Q. Don't you know that they were not paid in any other way than on C. B. Fisk—at the office of C. B. 340
Fisk?

A. No, sir.

Q. What did you mean by saying that some of these drafts were made payable at the Shoe & Leather Bank?

A. I meant just what I said.

Q. You meant that some of the drafts drawn by

341 Baldwin were drawn on you payable at the Shoe & Leather Bank and were payable by you there?

A. Yes, sir.

Q. How were they paid by you?

A. Charged to my account.

Q. Paid by your check?

A. Charged in my account.

Q. So that the moneys which you claim to have paid of this $40,000 and which were represented by drafts on the Shoe & Leather Bank were not neces-
342 sarily paid by checks drawn on your individual account in the Shoe & Leather Bank?

A. No.

Q. They were paid by the bank simply because they were drawn upon you payable at the bank?

A. Yes, sir.

Q. And did the bank take no voucher from you at all?

A. That would be the voucher; yes, sir.

Q. Where are those drafts?

343 A. They were in your hands the last I knew anything about them.

Q. That is false. Did you ever see them in my hands?

A. I say that is my information.

Q. In my hands?

A. Yes, sir.

Q. Did you ever see them in my hands?

A. No, sir, I never did.

Q. What do you mean by making such a remark
344 as that?

A. I say it is to the best of my knowledge and belief.

Q. Who told you that?

A. Mr. Williams.

Q. He told you that he had put them in my hands?

A. Yes, sir.

Q. In the hands of John R. Dos Passos? 345

A. He said that his office was stuffed half full.

Q. Did he say that the drafts in question were in my hands?

A. Yes, sir.

Q. And you have no doubt about that?

A. I have no doubt about his saying it.

Q. When you say that they are in my hands you mean that Williams told you so?

A. Yes, sir.

Q. That is all you know? 346

A. That is all I know about it.

Q. You have not the possession of any of those drafts?

A. No, sir, not a paper.

Q. Not a paper?

A. No, sir.

Q. You kept other books, didn't you?

A. Yes, sir.

Q. Where are they?

A. With those papers; everything pertaining to 347 the mines.

Q. Where is your private memorandum book?

A. That is with them.

Q. And then you mean to say on this examination that you have no books or papers now in your possession or under your control relating to the McMorris mine?

A. That is what I say, in relation to the point you are talking about. Of course I have the books of the McMorris Mining Company in my possession. 348

Q. That is, the official books?

A. Yes, sir.

Q. You have no private books?

A. Every private book and every private paper was stolen from my office two or three years ago, and I have not seen them since except that we pumped out a small handful of them.

349 Q. Where are those that you pumped out?

A. They are in the hands of the Referee in the other branch of this case.

Q. Then those papers were taken from you by your former partner, Mr. Williams?

A. He says so; yes, sir.

Q. The sum of $40,000 that you claim to have paid was paid in the way you have stated?

A. Yes, sir.

Q. And in no other form?

350 A. No other form.

Q. Were you present when this transaction was made between McMorris and Baldwin in California?

Objected to as not proper evidence, as it has not been shown that any transaction was made between Mack Morris and Baldwin.

Question withdrawn.

Q. Where is your private bank-book and check-
351 book on the Shoe & Leather Bank?

A. My check-book I said I thought was in possession of the Referee; it was used in the other case; it is among the papers there.

Q. With the Referee?

A. Yes, sir.

Q. Among the books?

A. Yes, sir.

Q. You have not possession of it now?

A. No, sir.

352 Q. Is the same remark true of your check-book?

A. That is what you spoke of, the check-book.

Q. I spoke of the bank-book and the check-book.

A. My bank-book I presume I have.

Q. But you haven't your private check-book on that bank?

A. No, sir.

Q. You are sure of that?

A. Quite sure of that; yes, sir. 353

Q. There can be no mistake about it, can there?

A. I think not; it was in use in the Court and was left there with the other books. It may be in Mr. Peckham's office.

MR. PECKHAM: The books were used on the trial in the case between the General and his partner. That case has been closed in the trial. Whether any of those books are now actually in possession of the Referee who is 354
Receiver under the judgment, or whether they are in our office, I do not know. It may be one or the other. The gentleman who was Referee in that case was also appointed Receiver to wind up the concern.

Q. Over what period of time did those payments of $40,000 extend?

A. Well, I should think from six to twelve months. 355

Q. From six to twelve months?

A. Yes, sir.

Q. And you actually paid out $40,000 in cash for 10,000 shares of the stock?

A. Yes, sir.

Q. Where did you get that money?

A. I earned it.

Q. How?

A. In sundry pursuits.

Q. Where did you have it? 356

A. Where did I have the money?

Q. Yes; where did you have the money?

A. I had it in certain investments.

Q. What were they?

A. And cash in bank.

Q. How much had you in bank?

A. That I cannot tell.

357 Q. About how much?
A. I could not tell you about.
Q. Could you not approximate?
A. I could not.
Q. You cannot give us the slightest idea?
A. No, sir.
Q. How had you made the money?
A. How did I make my money?
Q. Yes, this $40,000?
A. Same as I had all my other moneys.
358 Q. How was that? I don't know, I am sure. Your history is unknown to me. I haven't read the newspapers as carefully as some people have.

Objected to.

Q. You say you had some of this money deposited in the bank and you don't know how much. How much of the $40,000 had you invested?
A. I don't know; I had three or four hundred
359 thousand dollars in good investments.
Q. Of your own money?
A. Yes, sir.
Q. At that time?
A. Yes, sir.
Q. How much had you in the firm of C. B. Fisk & Co.?
A. At that time?
Q. Yes, sir.
A. I could not tell.
360 Q. About how much?
A. I had simply put into its capital $10,000 I think, but my deposits had run very large in it; how much I do not remember.
Q. Do you claim or do you say that a large portion of this $40,000 was invested in the firm of C. B. Fisk & Co.?
A. No, sir.

Q. You do not claim that or say that? 361
A. No, sir.
Q. Where was the proportion—where did the money lay at the time you drew it for the purpose of paying this $40,000?

MR. PECKHAM: I submit that the witness has stated that he drew the money from several different sources, and when he paid it it must have been in those sources.

362

Q. How did you make the $40,000 and in what form was the $40,000 invested, whether the same was in your possession and under your control at the time you allege to have paid it out?

Objected to.
Answer is withheld for the present.

Q. You went into this McMorris Mining Company with several other gentlemen, did you not? 363
A. Yes, sir.
Q. Who were they?
A. The gentlemen associated with me were Mr. Stout and Mr. Navarro.
Q. Those were the two gentlemen associated with you?
A. Yes, sir.
Q. Anybody else?
A. No, sir; I think not.
Q. And what was the purpose of your association; was it to buy this mining property? 364

Objected to on the ground that this is just the part of the question which is now pending before the Judge.

Q. I will ask you, then, how much money did

365 each of these gentlemen contribute to this association, Mr. Navarro and Mr. Stout?

Objected to.

Q. Did you introduce this matter to Mr. Stout and Mr. Navarro?

A. I did not.

Objected to.

366 Q. You did not?

A. No, sir.

Q. Did you make any representations or statements to those gentlemen in respect to this mining property?

Objected to.

Q. When were those representations made, if there were any?

367

Objected to.

Q. And state what the statements or representations were?

Objected to.

All these questions are reserved.

Q. When did you receive your stock of 10,000 shares?

368 A. I could not tell here?

Q. About when?

A. Oh, I should think within the first few months of the organization of the company. It wasn't issued speedily.

Q. You got no paper showing the amount of money that you paid in from anybody prior to the certificates?

A. I think I have. 369
Q. From whom did you get a paper?
A. Major Baldwin.
Q. Where is that paper?
A. If I haven't it, it is among the others.

MR. DOS PASSOS: Now, I ask the witness to produce that paper at the next meeting.

THE WITNESS: I will look for it; I presume, though, it is among the other papers.

370
Q. You were the treasurer, were you not?
A. No, sir; I was not.
Q. I mean before the formation of the company?
A. No, sir.
Q. Didn't you receive the money of Mr. Navarro and Mr. Stout?

Objected to.

Q. Did you sell any of this stock to the firm of C. B. Fisk & Co.? 371
A. I did not.
Q. Did you never sell them any stock?
A. Never.
Q. And you are positive of that?
A. Yes, sir.
Q. Didn't you sell them 2,500 shares for $10,000?
A. No, sir; they subscribed for 2,500 shares in addition to my 10,000.
Q. In addition to what 10,000?
A. The 10,000 shares that I subscribed for. 372
Q. Whom did they pay that money to?

Objected to.

Q. Didn't you receive the $10,000 paid by C. B. Fisk & Company for 2,500 shares of this stock?

Objected to.

373 Q. Didn't you keep a private memorandum book that you have in your possession now?

A. No, sir; I kept one, but I haven't it in my possession now.

Q. Haven't you exhibited that private memorandum book since the commencement of this suit?

A. No, sir.

Q. And you mean to say that you have no private memorandum book relating to the McMorris mine?

374 A. Not in my possession. Every scrap of paper, every account and my private books were all stolen from me and carried off. I saw my private memorandum book in the office of the attorney of Mr. Williams and he subsequently said that you had them.

Q. Perhaps you won't have any objections to saying whether you know a Mr. George H. Cook?

A. No, I don't remember any Geo. H. Cook.

Q. One of the former owners of the McMorris

375 mine, one of the partners?

A. I saw such a party; Major Baldwin brought such a party to me, I never saw him over five minutes I don't think.

Q. You only saw him once for about five minutes?

A. That is all, I think.

Q. Have you any doubt about that?

A. About my seeing him?

Q. Yes?

376 A. I saw a party that he said was Cook.

Q. Baldwin was a very truthful sort of a man?

A. I don't know; he was a mining man.

Q. You don't think Baldwin would introduce anybody to you under a fictitious name, do you?

A. I am not certain whether he would or not.

Q. You are not certain?

A. No, sir.

Q. Have you seen the deposition of Mr. Cook in 377
the case of Williams against Fisk—you have read the deposition, haven't you?

A. I don't think I did.

Q. The cross-interrogatories that were submitted?

A. I don't think I ever read them.

Q. You don't think you ever did?

A. No, sir.

Q. Where are the official books of the McMorris Mining Company?

A. Part of them are in my office, and a part at 378
the Shoe & Leather Bank.

Q. The records—have you got those in your offices?

A. You mean the secretary's records?

Q. No, the old deeds?

A. They are in one of those offices, I cannot tell you which.

Q. Either one or the other?

A. Yes, sir, I think they must be.

Q. Will you bring them here at the next exami- 379
nation? Have you any objections to bringing them here?

MR. PECKHAM: I have no objection to their asking us to bring any books here, but we will not promise what we will do.

Adjourned to Nov. 17, 1883, at 10:30 A. M.

380

381 SUPREME COURT,

CITY AND COUNTY OF NEW YORK.

FRANCIS A. FOGG,
Plaintiff,

AGAINST

CLINTON B. FISK,
Defendant.

382

Petition for transfer of suit to Federal Court.

TO THE HONORABLE THE SUPREME COURT OF THE STATE OF NEW YORK IN AND FOR THE CITY AND COUNTY OF NEW YORK:

Your petitioner, Clinton B. Fisk, respectfully shows that he is the defendant in the foregoing entitled suit, and that the same was commenced on or about the 10th day of April, 1882, in said Su-
383 preme Court by the service of the summons and complaint therein on your petitioner. That your petitioner was at the time of bringing said suit and still is a citizen of the State of New Jersey and resident thereof.

Your petitioner further shows that there is and and was at the time said suit was brought a controversy therein between your petitioner and the above-named plaintiff, Francis A. Fogg, who at said time was and has since continued to be a citizen of the
384 State of New York and resident thereof; that said action was brought by said plaintiff against your petitioner for the purpose of recovering $63,250 damages, alleged to have been sustained by said plaintiff by the fraud and deceit of your petitioner, in inducing plaintiff to purchase certain mining stocks; that said defendant has answered and said suit is at issue, and that the matter in dispute in

this suit exceeds the sum of five hundred dollars, 385
exclusive of costs.

Your petitioner further represents that this suit has not been tried, but is now pending for trial in the said Supreme Court of the State of New York in and for the City and County of New York, in the Southern District of New York, in the Second Circuit, and that your petitioner desires to remove the same into the Circuit Court of the United States for the said Southern District of New York, in pursuance of the Revised Statutes of the United States, 386
section 639, subdivision 3, and of the Acts of Congress in that behalf provided.

Your petitioner further says that he has filed the affidavit required by the statute in such cases, and offers herewith his bond executed by William J. Hutchinson, of the City of New York, and John B. Cornell, of the City of New York, as surety in the penalty of $75,000, conditioned as by said Acts of Congress required.

That no previous application for the relief now 387
sought has been made.

Your petitioner therefore prays this Court to accept this petition, and that the said bond may be accepted as good and sufficient according to the said Statutes and Acts of Congress, and that said suit may be removed into the next Circuit Court of the United States in and for said Southern District of New York, pursuant to the aforesaid Acts of Congress in such case made and provided, and that no further proceedings may be had therein in this 388
Court.

And your petitioner will ever pray, &c.

New York, November 13, 1883.

CLINTON B. FISK.

MILLER, PECKHAM & DIXON,
Defendant's Attorneys,
No. 29 Wall St., N. Y.

389 STATE OF NEW YORK, }
City and County of New York, } ss.:

CLINTON B. FISK, of Seabright, in the State of New Jersey, being duly sworn, says that the foregoing petition subscribed by him is true to the knowledge of deponent except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

CLINTON B. FISK.

390 Subscribed and sworn to before me at the City of New York this 13th day of November, 1883.

J. A. WALTER,
[SEAL.] Notary Public,
Kings County.

Certificate filed in N. Y. County.

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391 SUPREME COURT OF THE STATE OF NEW YORK,

CITY AND COUNTY OF NEW YORK.

FRANCIS A. FOGG,
Plaintiff,

AGAINST

392 CLINTON B. FISK,
Defendant.

STATE OF NEW YORK, }
City and County of New York, } ss.:

I, CLINTON B. FISK, being duly sworn, do say that I am the defendant in the above-entitled ac-

tion; that I have reason to believe and do believe 393
that from prejudice and local influence I will not be
able to obtain justice in said State Court.

CLINTON B. FISK.

Subscribed by the said Clinton B. Fisk in my presence, and by him sworn to before me, at the City of New York aforesaid, this 13th day of November, 1883.

J. A. WALTER, 394
[SEAL.] Notary Public,
Kings Co.

Cert. filed in New York Co.

KNOW ALL MEN BY THESE PRESENTS:

That we, CLINTON B. FISK, of Seabright, in the State of New Jersey, as principal, and JOHN B. CORNELL, of the City of New York, and WILLIAM J. HUTCHINSON, of the City of New York, as sureties, are held and firmly bound unto Francis A. Fogg, of 395
the City of New York, in the penal sum of $75,000, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents. The consideration of this obligation is such that if the above bounden Clinton B. Fisk shall make, enter and file, or cause to be made, entered and filed, in the next Circuit Court of the United States in and for the Southern District of New York, on the first day of its next session, copies of 396
the record in such suit, and of all process, pleadings, depositions, testimony and other proceedings in a certain suit or action now pending in the Supreme Court of the State of New York in and for the City and County of New York, in which suit the said Francis A. Fogg is plaintiff and the said Clinton B. Fisk is defendant, and shall pay all costs that may

397 be awarded by said Court, if said Court shall hold that such suit was wrongfully or improperly removed thereto, and shall then appear and enter in said Circuit Court special bail in said suit, and shall do such other acts as by the Acts of Congress in that behalf are required to be done upon the removal of such suit from said State Court into the said United States Court, then this obligation to be void, otherwise to remain in full force and virtue.

398 Witness our hands and seals, at the City of New York, this 13th day of November, A. D. 1883.

CLINTON B. FISK, [L. S.]
JOHN B. CORNELL, [L. S.]
WM. J. HUTCHINSON. [L. S.]

Sealed and delivered in the presence of }
J. A. WALTER.

STATE OF NEW YORK, }
City and County of New York, } ss.:

399 JOHN B. CORNELL, being duly sworn, says that he is one of the sureties named in the foregoing bond; that he resides at 530 Fifth avenue, in the City of New York; that he is a resident and freeholder within the State of New York and is worth the sum of $150,000 over and above all his just debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

400 JOHN B. CORNELL.

Subscribed and sworn to before me November 13, 1883. }
J. A. WALTER,
[SEAL.] Notary Public,
Kings Co.

Certificate filed in N. Y. Co.

STATE OF NEW YORK, City and County of New York, } ss.: 401

WILLIAM B. HUTCHINSON, being dulys worn, says that he is one of the sureties named in the foregoing bond; that he resides at 4 West Fifty-eighth street, in the City of New York; that he is a resident and freeholder within the State of New York and is worth the sum of $150,000 over and above all his just debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution. 402

WM. J. HUTCHINSON.

Subscribed and sworn to before me November 13, 1883.

J. A. WALTER,
[SEAL.] Notary Public,
Kings Co.

Cert. filed in N. Y. Co.

403

STATE OF NEW YORK, City and County of New York, } ss.:

On this 13th day of November, 1883, before me personally came Clinton B. Fisk, John B. Cornell and Wm. J. Hutchinson, known to me, and known to me to be the individuals described in and who executed the foregoing bond, and severally acknowledged to me that they had executed the same.

J. A. WALTER,
[SEAL.] Notary Public, 404
Kings Co.

Cert. filed in N. Y. Co.

405

At a Special Term of the Supreme Court of the State of New York, held at Chambers thereof, in the County Court House, in the City of New York, on the 15th day of November, 1883.

Present—Hon. Charles Donohue, Justice.

406

Francis A. Fogg,
Plaintiff,

against

Clinton B. Fisk,
Defendant.

407

On reading and filing the annexed petition and affidavit of defendant, verified November 13th, 1883, praying for the removal of this suit into the Circuit Court of the United States for the Southern District of New York, in pursuance of the laws of the United States relating to the removal of suits from the State Courts, and upon filing the bond with good and sufficient surety offered by said de-
408 fendant according to the requirements of said laws,

On motion of Miller, Peckham & Dixon, attorneys for said defendant, it is

Ordered, that said bond, with good and sufficient surety, and said petition, be accepted, and that said suit be removed into the Circuit Court of the United States for the Southern District of New York, in

the Second Circuit, and that no further proceedings 409
be had in this Court.

Witness the Honorable Charles Donohue, one of the Justices of said Supreme Court in and for the City [SEAL.] and County of New York, and the seal thereof, this 15th day of November, 1883.

C. DONOHUE,
Justice Supreme Court.

(A Copy.) 410

PATRICK KEENAN,
Clerk.

CITY AND COUNTY OF NEW YORK:

I, PATRICK KEENAN, Clerk of the said City and County, and Clerk of the Supreme Court of said State for said County, do certify that I have compared the preceding with the original record on file in my office, and that the same is a correct transcript therefrom and the whole of such original 411
record.

In witness whereof, I have hereunto subscribed my name and affixed [SEAL ] my official seal, this thirteenth day of December, 1883.

PATRICK KEENAN,
Clerk.

[ENDORSED:]

Supreme Court. Francis A. Fogg against Clinton 412
B. Fisk. Copy order for removal, filed November 15, 1883. Miller, Peckham & Dixon, attorneys for defendant, 29 Wall street, N. Y. To John R. Dos Passos, Esq., attorney for plaintiff, 3 Broad street, N. Y. Recorded November 22, 1883. U. S. Circuit Court. Filed December 13, 1883. Timothy Griffith, clerk.

413 UNITED STATES CIRCUIT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

FRANCIS A. FOGG,
Plaintiff,

AGAINST

CLINTON B. FISK,
Defendant.

414

SIRS—Take notice, that upon the annexed affidavit of Francis A. Fogg, the plaintiff herein, and upon the order heretofore granted in this action by the Hon. George C. Barrett, one of the Justices of the Supreme Court of the State of New York, dated the 12th day of January, 1883, and requiring the defendant Clinton B. Fisk to be examined and his testimony and deposition taken as a party be-
415 fore trial, pursuant to sections 870, 871, 872, 873, &c., of the Code of Civil Procedure, of the State of New York, and directing said defendant to personally be and attend before one of the Judges of said Court for the purposes of said examination; and upon the order and papers in this action by which the defendant, on the 13th day of November, 1883, removed this action from the said State Court into this Court, where it is now pending; and upon the deposition and examination of said defendant,
416 taken pursuant to said first mentioned order and pending prior to and at the time of such removal which, said examination was prior to said removal adjourned to the 17th day of November, 1883, and upon all the pleadings and proceedings heretofore had in this action, and upon the papers referred to in the affidavit of said Fogg hereto annexed, and the record filed in this Court

on the 13th day of December, 1883, the undersigned 417
will move this Honorable Court, at a stated term, thereof to be held in the Post Office Building, Room 47, in the City of New York, on the 21st day of December, 1883, at 11 o'clock in forenoon of that day or as soon thereafter as counsel can be heard, for an order directing that the examination of the said defendant Fisk, pursuant to the order dated the 12th day or January, 1883, hereinbefore referred to and pending in the said State Court at the time of the removal of this action, and all proceedings thereun- 418
der, be continued and taken in this Court with the same force and effect as the said proceedings and examination would have been continued and taken in the said State Court if this action had not been removed by the defendant into this Court, and directing that the said defendant Clinton B. Fisk personally be and attend before one of the Justices of this Honorable Court, at a stated term thereof, to be held at room 47, Post Office Building, in the City of New York, on a day to be hereinafter designated by 419
the said Justice, then and there to be examined, and his deposition taken for the purposes named in said order on the 12th of January, 1883, and for such other and further relief in the premises as may be just and proper.

Dated New York, December 17th, 1883.

Yours, &c.,

JOHN R. DOS PASSOS,
Attorney for Plaintiff.

Office and P. O. address: 420
No 29 Wall street,
N. Y.

TO MILLER, PECKHAM & DIXON, ESQS.,
Defendant's Attorneys.

421 CIRCUIT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

FRANCIS A. FOGG,
Plaintiff,

AGAINST

CLINTON B. FISK,
422 Defendant.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

FRANCIS A. FOGG, being duly sworn, doth depose and say that he is the plaintiff in the above-entitled cause, which was originally commenced in the Supreme Court of the State of New York, in and for the City and County of New York, on or about the
423 8th day of April, 1882; that said action is brought to recover from the defendant, Clinton B. Fisk, a large sum, to wit, about $63,000 (which this deponent was induced to pay to said Fisk for certain mining stocks, which were sold to this deponent by said Fisk pursuant to certain false and fraudulent representations made to deponent by the said defendant), the facts as to which are more fully set forth in the complaint in this action, which was served upon the attorneys for the defendant on the
424 21st day of April, 1882. That in pursuance of an order of arrest made in the said action by the Hon. Charles Donohue, a Justice of said Supreme Court, the said defendant Fisk was on or about the 18th day of April, 1882, arrested by the Sheriff of the said City and County of New York, and required to give bail in the sum of $75,000.

That on or about the 13th day of May, 1882, the

said defendant served his answer to the complaint herein, and that subsequently and on or about the 12th day of January, 1883, the plaintiff herein, pursuant to the provisions of Chapter IX., Title III., Article I., of the Code of Civil Procedure of said State of New York, entitled, "Depositions taken and to be used within the State," procured upon the affidavit of deponent an order from Hon. George C. Barrett, one of the Justices of said Supreme Court, requiring the said defendant Clinton B. Fisk to appear and be examined, pursuant to the provisions of said chapter, as a party, before trial in said action on the 31st day of January, 1883; that said order and the affidavit thereon, which were both served upon said defendant and his attorneys, are made part of this application; that thereafter and on or about the 20th day of February, 1883, the said defendant appeared by his counsel, Miller, Peckham & Dixon, and moved to vacate and set aside said last named order before Mr. Justice Donohue, then holding a Special Term of said Supreme Court in the City of New York, which said motion was wholly denied and an order so entered on the 24th day of February, 1883; that thereafter and on or about the 27th day of February, 1883, the defendant herein appealed from said last named order to the General Term of the Supreme Court in and for the First Judicial District thereof, held in the City of New York, before which said Court the appeal from said last named order was duly argued and heard. That on or about the 1st day of June, 1883, the said General Term wholly affirmed the order denying the motion of said defendant Fisk to vacate the said order for his examination as aforesaid, and that an order was so entered on or about the 5th day of June, 1883, from which last-named order the said defendant thereafter appealed to the Court of Appeals for the said State of New York. That the

said appeal came on to be heard before the Judges of said Court at the City of Albany, on or about the 2d day of October, 1883, when the same was fully argued and heard, and that said appeal was finally dismissed with costs to the respondent therein, meaning thereby this deponent, and that a judgment thereupon was subsequently entered against the defendant for the costs thereof. That after several adjournments were had for the accommodation of the defendant and his attorneys, the said defendant finally appeared for examination on October 20th, 1883, before Hon. George C. Barrett, one of the Judges of said Supreme Court, and was partly examined by deponent's counsel, pursuant to the said order of the 12th of January, 1883. That said defendant was likewise examined pursuant to said order on the 3d day of November, 1883, when the said examination was adjourned to the 17th day of November, 1883, so that Mr. Justice Donohue, before whom the same was then pending, could pass upon and decide certain questions which were asked of the defendant by deponent's said counsel upon said examination, and objected to by defendant's attorneys.

That Judge Donohue had not passed upon or decided said objections at the time of the removal of this action, and was prevented from so doing by said removal.

That on the 5th day of November, 1883, the defendant's attorneys served notice of motion to restore this action to the day calendar of the State Court for the 9th of November, and that on the same date the said defendant's attorneys served notice of motion, by order to show cause why an order should not be made directing a commission to issue to examine one George B. Walker, a witness upon behalf of the defendant at London, England. That the said motion to place this cause on the day

calendar was finally heard, and said action advanced 433
upon the day calendar by order of the said Court for the 19th day of November, and that the said motion for a commission was likewise granted, and an order so entered on the 9th day of November, 1883, and that thereafter and on or about the 9th day of November, 1883, said defendant served interrogatories upon deponent's attorney, to be asked of the said George B. Walker, and that deponent was given until the 19th day of November, 1883 to serve cross-interrogatories. 434

Deponent further says he has been informed by his attorney herein that the said defendant, upon an *ex parte* application made to Mr. Justice Donohue, on or about the 13th day of November, 1883, caused this action to be removed into this Court, where it is now pending undetermined, and that said removal was, among other things, based upon the grounds that said defendant was a citizen of New Jersey, and upon an affidavit made by said Fisk that he had reason to believe and did believe, 435
that from prejudice and local influence he would not be able to obtain justice in the State Court.

That a copy of the order for said removal was not served on deponent's attorney herein until the 22d day of November, 1883, on which date deponent's said attorney wrote to the defendant's attorneys, demanding that the said defendant appear in this Court on the 24th day of November, 1883, at 10:30 o'clock of that day, to be examined pursuant to the proceedings pending in the Supreme Court when 436
this action was removed, but that said attorneys have failed and neglected to reply to said letter or demand, and that said defendant failed and neglected to appear in this Court on the day named for the purposes of said examination. That deponent verily believes that the sole purpose for which the defendant procured said removal into this Court was

437 to frustrate, hinder and delay the said examination, and the trial of this action. That the examination has already been delayed by the defendant nearly a year in the State Court, and that deponent is anxious to proceed with and to finish the same so as to prepare for the trial of this action. That deponent makes the examination taken in said Supreme Court, and the record therein filed in this Court by this deponent on the 13th day of December, 1883, a part of this application, and respectfully asks for an
438 order of this Court continuing the said examination in this Court, and requiring said defendant personally to appear forthwith in this Court to be examined pursuant to said order.

FRANCIS A. FOGG.

Sworn to before me this 17th day of December, 1883.

WILLIAM G. DAVIS,
Notary Public,
N. Y. County.

439

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UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FOGG

440 AGAINST

FISK.

WALLACE, J.:

At the time this suit was removed from the State Court by the defendant, his examination as a wit-

ness was pending under an order of that Court di- 441
recting him to appear and be examined before the trial as a witness at the instance of the plaintiff. By the Code of Civil Procedure of this State a deposition thus taken may be read in evidence by either party at the trial of the action, and also in any other action brought between the same parties, or between parties claiming under them or either of them (Sec. 881) and has the same effect as though the party were orally examined as a witness upon the trial (Sec. 883). 442

The plaintiff now moves for leave to proceed with the examination of the defendant pursuant to that order, and the defendant resists the application upon the ground that the examination of a party before the trial as a witness for the adverse party is not permitted by the practice of this Court.

It is well settled in this circuit that Sec. 914, U. S. Rev. Statutes, for conforming the practice of the Federal Courts in suits at common law as near as may be to that of the State Courts, does not apply 443
to the taking of testimony, because the Statutes of Congress cover the whole subject, and these statutes not only do not provide for the examination of a party as a witness for the adverse party before the trial in actions at law, but do not permit evidence thus obtained to be used upon the trial as a substitute for the oral examination of the witness. U. S. Revised Statutes, Sec. 861; Beardsley vs. Littell, 14 Blatch., 102; U. S. vs. Pings, 4 Fed. Rep., 714. If, therefore, this were an action originally brought in 444
this Court, the plaintiff should not be permitted to proceed with the examination of the defendant. But the removal act of 1875 carefully saves to both parties the benefit of all proceedings taken in the action prior to its removal from the State Court. Section four declares that when any suit is removed from a State Court to a Circuit Court of the United

445 States, all injunction orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the Court to which such suit shall be removed. By force of this provision, the plaintiff is entitled to proceed with the defendant's examination unless for some substantial reason the revisory power of this Court should be exercised to deprive him of the benefit of the order he has obtained and the proceeding he has instituted. It lies with the defend-
446 ant, therefore, to present some controlling reason to the judicial discretion for denying to the plaintiff the right which he had secured, and of which he could not be deprived, except by a removal of the suit. That both parties have deemed this proceeding an important one is obvious from the tenacity with which the right to pursue it has been contested. It appears by the record and moving papers that the defendant has been defeated in efforts to vacate the order for his examination by the Supreme
447 Court at Special Term and at General Term, and by the Court of Appeals and thus, although for a period of eighteen months he was willing to submit his rights to the State Courts, he invoked the jurisdiction of this Court when there was no other resource left by which he could escape an examination. Certainly there are no equities which should induce this Court to deprive the plaintiff of the fruits of his long struggle. If the examination of the defendant could subserve no useful *purpose to*
448 *the plaintiff*, undoubtedly the defendant should not be subjected to it, or be put to the annoyance or inconvenience which it might entail upon him. But, although the defendant's testimony, when obtained, may not be of service to the plaintiff, to the full extent it would be in the State Courts, it may, nevertheless, be of some value. If it cannot be used on the trial of this action as a substitute for the

oral examination of the defendant, *it can be as the declarations of a party;* and it can also be used in other suits in the Courts of this State between the same parties or their privies, pursuant to Sec. 881 of the Code. There seems to be no reason, therefore, for dissolving or modifying the order of the State Court, or for denying to the plaintiff the benefit of the proceeding which was pending when the defendant removed the suit. 449

The motion is granted.

450

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At a Stated Term of the Circuit Court of the United States, held in and for the Southern District of New York, at the Post Office Building in the City of New York, on the 11th day of January, 1884.

451

Present—HON. WILLIAM J. WALLACE, Circuit Judge.

FRANCIS A. FOGG,
Plaintiff,

AGAINST

CLINTON B. FISK,
Defendant. 452

A motion having been this day made in this cause for an order directing that the deposition and examination of the defendant Clinton B. Fisk, heretofore being taken pursuant to the order of the Supreme Court of the State of New York, dated

January 12th, 1883, while this action was pending in said Court and at the time of the removal thereof, be continued and taken in this Court with the same force and effect as the said examination and proceedings would have if continued and taken in the said State Court under said order if this action had not been removed by the defendant therefrom, and said motion now coming on to be heard, after reading and filing (1) the notice thereof, dated December 17th, 1883, (2) the affidavit of F. A. Fogg, dated on the same date thereto annexed, and (3) the affidavit of Joseph J. Schmidt, dated December 18th, 1883, showing due service of said last-named papers, and (4) the record of removal in this cause referred to in the affidavit of said Fogg, and all the pleadings and proceedings herein, and after hearing John R. Dos Passos, Esq., of counsel for the plaintiff in favor of said motion, and Wheeler H. Peckham, Esq., of counsel for defendant in opposition thereto, and after due deliberation,

Ordered, that said motion be and the same is hereby granted and the examination and deposition of said defendant pursuant to the order of Mr. Justice Barrett in the State Court, be and the same and all proceedings thereunder are in all respects continued in full force in this Court, with leave to plaintiff to proceed thereunder, and, on like motion, it is further

Ordered, that the defendant Clinton B. Fisk be and he is hereby directed and required to attend personally on the 21st day of February, 1884, before John A. Shields, Commissioner of the Circuit Court of the United States, for the Southern District of New York, Second Circuit, as Master, at his office, Room 78, Post Office Building, in said City of New York, at 10:30 o'clock in the forenoon of that day then and there, and on such other days as may be designated, to be examined and his testimony and

deposition taken and continued as a party before 457
trial pursuant to section 870, *et seq.*, Code of Civil Procedure, and for the purpose mentioned in said order of January 12th, 1883, and any question of law arising upon such examination shall be certified by said Commissioner to one of the Judges of this Court.

(Signed)
WM. J. WALLACE.

458

At a Stated Term of the Circuit Term of the United States, in and for the Southern District of New York, held at the United States Court and Post Office Building in the City of New York, on the 3d day of March, 1884.

Present—HON. WILLIAM J. WALLACE, Judge. 459

FRANCIS A. FOGG,
Plaintiff,

AGAINST

CLINTON B. FISK,
Defendant.

Upon reading the record in this action, duly certi- 460
fied by John A. Shields, Esq., as Master, wherein it appears that the defendant, Clinton B. Fisk, pursuant to the order *entered herein*, on the 15th day of February, 1884, was required personally to attend before said Master at the times and places therein named, to be examined by the plaintiff herein, as in said order provided, and it appearing that said de-

461 fendant did, on the 25th day of February, 1884, appear before such Master and was then and there requested to be sworn and examined pursuant to the terms of said last-named order, and that said defendant, Clinton B. Fisk, refused to be so sworn or to answer any questions, as appears by said record so certified as above, now upon the record, and all papers in this action, and all orders and proceedings heretofore made herein, and on motion of John R. Dos Passos, attorney for the plaintiff, sufficient cause
462 being shown therefor,

Ordered that the said defendant, Clinton B. Fisk, personally attend and be before the undersigned, or one of the judges of this Court, at a stated term thereof, to be held at the United States Court and Post Office Building, Room 47, in the City of New York, on the seventh day of March, 1884, at 11 o'clock in the forenoon of that day, then and there to show cause, if any there be, why he, the said defendant, Clinton B. Fisk, should not be punished as
463 for a contempt of court in refusing to be sworn before said Master, and in refusing to answer questions propounded to said defendant upon said examination, more particularly referred to and specified in the record certified to this Court as aforesaid, a copy of which is herewith served, and why the plaintiff herein should not have such other and further relief in the premises, as may be just and proper.

WM. J. WALLACE.

464

CIRCUIT COURT OF THE UNITED STATES, 465
SOUTHERN DISTRICT OF NEW YORK.

FRANCIS A. FOGG,
Plaintiff,

AGAINST

CLINTON B. FISK,
Defendant.

466

An order having been made herein by the Hon. WM. J. WALLACE, Circuit Judge, requiring the defendant, Clinton B. Fisk, to appear before the undersigned, John A. Shields, U. S. Commisioner as Master, for the purpose of being examined and his deposition taken pursuant to the terms of said order, and the said Clinton B. Fisk having failed personally to appear on the date, at the hour (10½ o'clock A. M.) named in said order, but having appeared by W. H. Peckham, Esq., his counsel, and asked for an adjournment of said examination, now it is ordered by the Master that said examination be adjourned to th 25th day of February, 1884, at 10:30 A. M., at this office (Room 78, Post Office Bullding, City of New York, and the said defendant is hereby required to appear on said adjourned day and hour; this adjournment being without prejudice to any right which the plaintiff may have, by reason of the failure of said defendant to appear this day as by said order required.

467

468

February 21, 1884, 11:05 o'clock A. M.

JOHN A. SHIELDS,
Master, &c.

MR. DOS PASSOS,
Appearing for Plaintiff.
MR. WHEELER H. PECKHAM,
Appearing for Defendant.

469 NEW YORK, February 25th, 1884.

Present—JOHN R. DOS PASSOS, ESQ., counsel for plaintiff, and WHEELER H. PECKHAM, ESQ., counsel for defendant, and the defendant in person.

Counsel for plaintiff does not ask that the witness be sworn by the Master, but claims that the oath administered in the State Court is operative, the proceedings being continued.

Counsel for defendant does not ask to have the
470 defendant sworn; but at the same time claims that he cannot be examined without the administration of an oath, even if he could then be examined.

The counsel for the plaintiff then requests the Commissioner to administer the oath to the defendant, whereupon the Commissioner proposes to administer the oath to the defendant.

The defendant with the greatest respect to the Court and the Commissioner, and solely because he can raise the question in no other way, he declines
471 to be sworn.

1 Q. What was the consideration paid on the sale of the McMorris mine?

The defendant, while respecting and expressing as above the greatest respect for the Court and the Commissioner, and solely because he can raise the question in no other way, declines to answer.

2 Q. Will the defendant answer any question in this proceeding?

472 The defendant states that for the reason above stated, and under advice of counsel, he will not.

Counsel for the complainant thereupon asks the Master to certify this record to the Court.

CIRCUIT COURT OF THE UNITED STATES 473

FOR THE SOUTHERN DISTRICT OF NEW YORK.

FRANCIS A. FOGG

AGAINST

CLINTON B. FISK.

474

TO THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

I, JOHN A. SHIELDS, Commissioner of the Circuit Court of the United States for the Southern District of New York, to whom, by an order of this Court, filed February 15, 1884, it was referred as Master to take the testimony of Clinton B. Fisk, the defendant in the above-entitled matter, do hereby certify that on the 21st 475
and 25th days of February, 1884, I was attended by John R. Dos Passos, Esq., counsel for plaintiff, and Wheeler H. Peckham, Esq., counsel for defendant, and on the 25th day of February, 1884, I was attended by the defendant, Clinton B. Fisk, and that thereupon the proceedings stated in the foregoing record took place, and that the said record is herewith certified to the Court at the request of counsel for the plaintiff,

New York, February 28th, 1884. 476

JOHN A. SHIELDS,
Master.

A copy,
JOHN A. SHIELDS,
Master, &c.

477 At a Stated Term of the Circuit Court of the United States, held in and for the Southern District of New York, at the Post Office Building in the City of New York, on the 7th of March, 1884.

Present—Hon. William J. Wallace, Circuit Judge.

478 Francis A. Fogg,
Plaintiff,

against

Clinton B. Fisk,
Defendant.

An order having been made and entered in this action on the 15th day of February, 1884, continuing
479 the examination and deposition of the defendant heretofore taken in the State Court at the time of the removal of this action therefrom, and requiring the defendant Clinton B. Fisk personally to appear on the 21st day of February, 1884, before John A. Shields, Esq., as Master, to be examined, and his testimony and deposition taken and continued as a party before trial under the order of Mr. Justice Barrett, heretofore made herein on the 12th day of January, 1883, and the said defendant having per-
480 sonally attended before said Master on the 25th day of February, 1884, at the place named in said order of February 15th, and having then and there been requested by him to be sworn and to submit to an examination pursuant to the terms of said last-named order; and the said defendant having refused to be so sworn or examined, and to answer any questions, and an order having been thereupon

granted by the undersigned on the 3d day of March, 481
1884, requiring the said defendant personally to attend before me or one of the Judges of this Court, on the 7th day of March, 1884, and to show cause then and there why he, said defendant, should not be punished as for a contempt of Court in refusing to be sworn or examined, or to answer questions upon said examination before said Master, as in his certificate more fully specified; and said defendant having personally appeared in Court this day, and said motion now coming on to be heard, after hear- 482
ing John R. Dos Passos, Esq., counsel for the plaintiff, and William M. Evarts, Esq., and Wheeler H. Peckham, Esq., counsel for the defendant; and after reading and filing said order to show cause, and the certificate of the Master thereto annexed, and the record and all orders and proceedings heretofore had in this action, and the affidavit of Clinton B. Fisk, and the certificate of William M. Evarts and Wheeler H. Peckham, Esqs., thereto annexed;

It is hereby ordered and adjudged that the motion 483
to punish the said defendant for such contempt stand adjourned to the next motion day of this Court, to wit, on the 28th day of March, 1884.

It is further ordered that the defendant Clinton B. Fisk be and he is hereby directed and required to attend personally on the 14th day of March, 1884, brfore the HONORABLE ADDISON BROWN, one of the Judges of this Court, at a Stated Term thereof, at his Chambers in the Post Office Building, in said City of New York, at eleven o'clock in the forenoon 484
of that day; then and there and on such other days as may be designated, to be examined and his testimony and deposition taken and continued as a party before trial, pursuant to section 870, *et seq.*, of the Code of Civil Procedure, and for the purposes mentioned in said order of January 12th, 1883, and February 15th, 1884, heretofore made in this action.

485 At a Term of the Circuit Court of the United States for the Southern District of New York, held at Chambers, Post-office Building, in the City of New York, on the 24th day of March, 1884.

Present—Hon. Addison Brown,
District Judge.

486 Francis A. Fogg,
Plaintiff,

against

Clinton B. Fisk,
Defendant.

An order having been made herein by the Hon. William J. Wallace, Circuit Judge, on the 7th day
487 of March, 1884, requiring the defendant Clinton B. Fisk to appear before the undersigned on the 14th day of March, 1884, at 11 o'clock in the forenoon of that day, for the purpose of being examined and his deposition taken pursuant to the terms of said order, and the said examination having been adjourned from time to time, and the said defendant Clinton B. Fisk, having appeared in person on this 24th day of March, 1884, at 11 o'clock A. M., before me, pursuant to said order, with his counsel,
488 Wheeler H. Peckham, Esq., the plaintiff being represented by John R. Dos Passos, Esq.

*I hereby certify* that the following proceedings then took place before me.

Mr. Dos Passos (counsel for plaintiff): I now ask that the defendant Clinton B. Fisk, now present, be sworn under the order for his examination as directed by order of Mr. Justice Wallace.

THE DEFENDANT'S COUNSEL: Under my advice 489
the defendant declines to be sworn.

MR. DOS PASSOS (to the defendant): Q. What was the consideration paid on the purchase of the Mack Morris Mine referred to in the complaint in this action?

THE DEFENDANT'S COUNSEL: Under the advice of counsel the defendant refuses to answer this question.

ADDISON BROWN,
U. S. Dist. Judge. 490

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At a Term of the Circuit Court of the United States held in and for the Southern District of New York at Chambers, in the City of Syracuse, on the 25th day of March, 1884.

Present—HON WILLIAM J. WALLACE, 491
Circuit Judge.

FRANCIS A. FOGG,
Plaintiff,

AGAINST

CLINTON B. FISK,
Defendant. 492

An order having been made in this action on the 3d day of March, 1884, requiring the defendant herein to show cause before the undersigned, or one of the Judges of this Court on the 7th day of March, 1884, why, he, the said defendant, should not be punished as for a contempt of Court in refusing to

493 be sworn or examined or to answer questions upon the examination pending before the Master named in the order made and entered herein on the 15th day of February, 1884, and said motion having come on to be heard, and an order having been thereupon made and entered in this action on the said 7th day of March, 1884, adjourning the motion to punish said defendant for said contempt until the 28th of March, 1884, and said defendant having been directed and required in and by the terms of
494 said last named order to attend personally on the 14th day of March, 1884, before the Honorable Addison Brown, one of the Judges of this Court, at his Chambers in the Post-office Building in the City of New York, at 11 o'clock in the forenoon of that day, then and there and on such other days as should be designated, to be examined and his testimony and deposition taken and continued as a party before trial pursuant to Sec. 870 *et seq.* of the Code of Civil Procedure, and for the purposes mentioned
495 in said order of January 12, 1883, and February 15, 1884, heretofore made in this action, and it appearing that the defendant, after the several adjournments of said examination, did on the 24th day of March, 1884, appear before Honorable Addison Brown for the purposes of said examination, and was then and there before said Judge requested to be sworn and examined pursuant to the terms of said order made and entered herein on the 7th day of March, 1884, and it appearing by the certificate
496 of said Judge hereto annexed, that said defendant Clinton B. Fisk refused to be sworn or examined or to answer any questions upon said examination. Now, upon the record of removal in this action, and all orders and proceedings heretofore made and had herein, and on motion of John R. Dos Passos, Esq., attorney for the plaintiff, sufficient cause being shown therefor,

Ordered, that the said defendant Clinton B. 497
Fisk, personally attend and be before the undersigned, or one of the Judges of this Court at a stated term thereof, to be held at the United States Court and Post-office Building, Room 47, in the City of New York, on the 28th day of March, 1884. at 11 o'clock in the forenoon of that day, then and there, to show cause, if any there be, why he, the said defendant Clinton B. Fisk, should not be punished as for a contempt of Court in refusing to be sworn before said judge and in refusing to answer 498
questions propounded to said defendant upon said examination, more particularly specified in the certificate of the Hon. Addison Brown to this Court as aforesaid, a copy of which is herewith served, and why the plaintiff herein should not have such other and further relief in the premises as may be deemed just and proper.

WM. J. WALLACE,

Let this order and accompanying papers be served 499
on the 26th day of March, 1884.

WM. J. WALLACE.

500

501 CIRCUIT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF NEW YORK.

FRANCIS A. FOGG

AGAINST

CLINTON B. FISK.

502 CITY, COUNTY AND SOUTHERN DISTRICT OF NEW YORK, SS.:

CLINTON B. FISK, of Rumson Neck, New Jersey, being duly sworn, says he is defendant in above entitled action.

That pursuant to the order of this Court deponent attended before Mr. Commissioner SHIELDS. That deponent was informed by his counsel, Wheeler H. Peckham, that this Court had decided on the motion
503 to continue the examination of deponent; that such examination, if taken, could not be used on the trial of this cause and would not be testimony therein. That the Judge hearing said motion had so expressed himself in emphatic terms on the argument and again in his written opinion or decision. That deponent had been advised by his said counsel that this Court had no jurisdiction to make said order, and that at the request of his said counsel deponent had further taken the opinion of Hon. William M.
504 Evarts, and was by him also advised that this Court had no jurisdiction to make said order.

Deponent was also advised that there was no other way to raise the question of the jurisdiction of this Court to make said order than by declining to answer questions thereunder.

Pursuant to such advice of the counsel above named, and of both of them, deponent, while enter-

taining the greatest respect for this Court which 505
deponent has most clearly manifested by removing this case to this Court, and solely for the purpose of raising the question of the jurisdiction of this Court to make said order, and because he is advised that his examination, if taken, cannot be used as testimony on the trial of this cause, declined to answer the questions propounded before the Commissioner.

CLINTON B. FISK.

Sworn to before me this 7th March, 1884. } 506

WM. HENRY KNOX,
[L. S.] Notary Public.
N. Y. Co.

We hereby certify that we have examined the proceedings in the above entitled action, and are of the opinion that this Court had no jurisdiction to make the order for the examination of the defendant. We were further of opinion that the only way 507
for the defendant to raise the question was by respectfully declining to anwer questions under the order, and we so advised the defendant, deeming this the respectful and appropriate course to pursue in order to bring the matter before the Courts.

(Signed) WM. M. EVARTS,
WHEELER H. PECKHAM.
Of Counsel for Defendant.

508

509 At a stated Term of the Circuit Court of the United States, held in and for the Southern District of New York, at the Post Office Building in the City of New York, on the 19th day of April, 1884.

Present—Hon. William J. Wallace, Circuit Judge; Hon. Addison Brown, District Judge.

510 Francis A. Fogg,
Plaintiff,

against

Clinton B. Fisk,
Defendant.

The defendant, Clinton B. Fisk, above named, 511 having personally appeared this day to show cause why he should not be punished as for contempt of this Court, pursuant to the orders made herein respectively on the 3d day of March, 1884, and on the 26th day of March, 1884, copies of which said orders were served upon defendant personally, now upon filing said orders to show cause, the certificates of John A. Shields, Esq., as Master, the affidavit of the defendant and the certificate of his counsel and the certificate of Hon. Addison Brown, Judge, at- 512 tached thereto, together with the order of Mr. Justice Barrett, of the First Judicial Department of the Supreme Court of the State of New York; the orders of this Court made on the 15th day of February, 1884, and the 7th day of March, 1884, directing the defendant to appear for examination and the papers on which the same were founded and upon the record of removal herein and upon the

pleadings and all other orders, papers and proceed- 513
ings herein, it having been directed that these motions be heard before two judges; after hearing John R. Dos Passos, Esq., for the plaintiff, and William M. Evarts and Wheeler H. Peckham, Esqs., for the defendant, it is hereby

Ordered and adjudged that the refusals of said defendant, Clinton B. Fisk, to submit to an examination as a party before trial under the orders made herein on the 15th day of February, 1884, and the 7th day of March, 1884, respectively, constitute a 514
contempt of the authority and lawful orders of this Court and a disobedience thereof, and that such contempt actually did defeat, impair, impede and prejudice, and tend to defeat, impair, impede and prejudice the rights and remedies of the plaintiff herein, and the said defendant is hereby adjudged guilty of such contempt; and it is further adjudged that the said defendant shall forthwith pay to the Clerk of this Court for the use and indemnity of the plaintiff the sum of five hundred dollars, which 515
is hereby imposed as a fine for said contempt committed before Honorable Addison Brown, as specified in the order of March 26th, 1884, no penalty being imposed for the contempt before the said Master, and that said defendant shall be forthwith taken in custody by Joel B. Erhardt, Esq., U. S. Marshal for the Southern District of New York, and committed until said fine shall be paid, and until said defendant shall consent to submit to an examination and to answer all proper questions 516
that may be put to him by the plaintiff upon the examination referred to and directed in said orders of February 15th, 1884, and March 7th, 1884.

WILLIAM J. WALLACE,
ADDISON BROWN,
Judges.

517

To the Honorable the Chief Justice of the Supreme Court of the United States:

The petition of Clinton B. Fisk, complaining, respectfully shows:

That your petitioner is unjustly and unlawfully
518 detained and imprisoned by Joel B. Erhardt, Esq., United States Marshal for the Southern District of New York, in the City of New York, by virtue of an order purporting to be an order of the Circuit Court of the United States for the Southern District of New York, issued under the following circumstances:

One Francis A. Fogg, who is a citizen of the State of New York, in the year 1882 commenced his certain action against your petitioner, who is a citi-
519 zen of the State of New Jersey, in the Supreme Court of the State of New York, for damages exceeding the sum of five hundred dollars, for alleged deceit on the alleged sale of certain stocks by defendant to plaintiff.

Defendant duly appeared in said action and answered thereto by denying the alleged deceit and the alleged sale, and the alleged damages.

That thereafter the plaintiff in said action obtained from Hon. George C. Barrett, one of the
520 Judges of said Supreme Court of said State, pursuant to the Code of Civil Procedure of the State of New York, sections 870 to 884 inclusive, an order for the examination of the defendant before trial. That a motion of defendant to set aside said order for the examination of the defendant before trial was denied by said State Court, and such denial, on appeal, affirmed by the Court of Appeals of the

State of New York. That thereafter the examination of defendant was begun, and while such examination was so pending, this defendant, by due proceedings, removed said suit to the Circuit Court of the United States for the Southern District of New York. 521

That after such removal the said plaintiff in said cause caused the record of said suit in said State Court to be filed in clerk's office of the said United States Circuit Court, and thereupon, upon affidavits showing the above stated facts, moved this Court for an order that the examination of the defendant proceed in said Circuit Court of the United States. 522

That said United States Circuit Court, at a stated term thereof, granted said motion, and made an order that this defendant appear before Mr. Shields, a Commissioner of said Court, as Master, and be examined.

That pursuant to said order this petitioner did appear before said Mr. Shields, but respectfully refused to be sworn or to be examined. 523

That said plaintiff thereupon, before this Court, made an application to punish your petitioner for contempt, for such refusal.

That said motion coming on for hearing before said Circuit Court, at a stated term thereof, the said Court made an order continuing said application to a future day, and thereafter made a further order that your petitioner appear before Hon. Addison Brown, Judge of the District Court for the Southern District of New York, and submit to examination. 524

That pursuant to such order, and out of respect to the Court, your petitioner did so appear, and declined to be sworn or examined.

That thereupon said plaintiff moved this Court, at a stated term thereof, to punish your petitioner for contempt, for such refusal.

525 That your petitioner appeared on such motion and read and filed his affidavit and the certificate of his counsel, to the effect that such refusal was under the advice of his counsel, and with the greatest respect to the Court, and because he was advised that this Court had no jurisdiction to make the orders for your petitioner's examination.

That said United States Circuit Court, nevertheless, upon such motion, adjudged your petitioner guilty of contempt, and that your petitioner pay a
526 fine of five hundred dollars to the Clerk of the Court for the use of said plaintiff, and stand committed until the said fine was paid, and until your petitioner consented to be examined before said Hon. Addison Brown.

That under and pursuaut to said order, and not otherwise, your petitioner has been taken in custody by said Joel B. Erhardt, Marshal of said Southern District of New York, and is now held and imprisoned by said Marshal.

527 Your petitioner claims and avers that said Circuit Court of the United States had no jurisdiction to make said orders for examination of your petitioner, and that your petitioner was not bound to submit to the same, and that said Court had no jurisdiction to and could not legally adjudge your peti tioner guilty of contempt for refusing to obey the same, or to fine or imprison your petitioner therefor.

That annexed are true copies of the various writs,
528 processes, pleadings, affidavits, motion orders and proceedings in said suit hereinbefore referred to.

Wherefore, to be relieved of said unlawful detention and imprisonment, your petitioner prays that a writ of *habeas corpus*, to be directed to the said Joel B. Erhardt, Marshal, as aforesaid, may issue in this behalf so that your petitioner may be forthwith

brought before this Court to so submit to and receive what the law may require, and that a writ of *certiorari* issue to said Circuit Court requiring said Circuit Court to certify and return to this Court the said records and all papers, petitions, documents and proceedings under the control of said Circuit Court concerning said detention and imprisonment. 529

MILLER, PECKHAM & DIXON,
Attorneys for Petitioner,
29 Wall St., N. Y. 530

WHEELER H. PECKHAM,
Of Counsel.

531

UNITED STATES OF AMERICA,
State, City, County and Southern } ss.:
District of New York,

CLILTON B. FISK, of New York, being duly sworn, says that he is the petitioner named in the foregoing petition and subscribed by him.

That he knows the contents of said petition, and that the statements therein made are true as deponent verily believes.

532

Subscribed and sworn to before me this 3 day of January, 1885. } Clinton B Fisk

Danl Seymour

[372] Notary Public
NY Co

LS

113-713

# Supreme Court

OF THE UNITED STATES.

No. 7 (ORIGINAL)—OCTOBER TERM, 1884.

EX PARTE. IN THE MATTER
*of*
CLINTON B. FISK, Petitioner.

The petition of Francis A. Fogg, the plaintiff in the suit in which the order was made, adjudging the petitioner Clinton B. Fisk guilty of contempt, and who appeared in this Court, to resist the motion for a writ of *habeas corpus*, respectfuliy presents this petition, and prays that a rehearing may be granted in the above-entitled matter.

The judgment of the Court herein was announced through his Honor Mr. Justice Miller on or about the 2d day of March, 1885, but a copy of the opinion, although immediately requested of the Clerk, was not received by the counsel for your petitioner till on or about the 3d day of April, 1885.

That your petitioner is advised by his counsel, that, either through an imperfect presentation of the case, or inadvertence, or mistake, propositions or questions of law of great importance have been overlooked or avoided in the consideration of the points involved, and therefore your petitioner respectfully represents that a rehearing of said motion

should be had by the Court upon the following grounds:

*First.*—The cases relied on in the opinion of the Court to sustain its jurisdiction to review the proceedings of contempt by *habeas corpus* do not warrant the conclusion reached.

*Second.*—The Court, in its opinion, has misconceived, mistaken or overlooked the object and scope of the sections of the New York Code as construed by the Courts of that State, permitting the deposition of a party to be taken at the instance of the adverse party at any time before the trial.

*Third.*—The provisions of the New York Code, in reference to examining a party before trial, do not conflict with Section 861 of the R. S. of the U. S. or with any other statute of the United States.

As your petitioner is advised, the judgment of the Court in this case is upon an entirely new and novel question, and its effect will be to deprive a large class of suitors of valuable legal remedies.

Wherefore, your petitioner prays that a rehearing may be granted in this matter; and that your petitioner may have such other and further relief as may be just.

Dated New York, April 8th, 1885.

Francis A. Fogg.

The undersigned, counsel for Frances A. Fogg, hereby certifies that this petition is well founded.

John R. Dos Passos.

SUPREME COURT

OF THE UNITED STATES.

EX PARTE. IN THE MATTER
*of*
CLINTON B. FISK, Petitioner.

## Brief in support of the foregoing Petition.

**First.**—The Supreme Court has no jurisdiction to review the order in question by writ of *habeas corpus*.

I did not in my brief, or in the oral argument which I had the honor to address to the Court, deny the general rule now reiterated in the opinion of the Court in this case, that an order jurisdictionally void will be reviewed by writ of *habeas corpus*.

What I claimed, and now claim, is, that this Court will not convert the writ *habeas corpus* into a writ of error; that it will not review by writ of *habeas corpus* questions which can be properly heard on appeal or by writ of error.

If the questions can be reviewed in the last mentioned manner, the Court will dismiss the writ.

Now, my point is, that the petitioner was bound to submit to an examination, and if, after such examination, his deposition was received in evidence upon the trial, his remedy was to take an exception, and review the question by writ of error under Sections 691 or 652 of the Revised Statutes. Instead of resorting to this plain practice, he deliberately places himself in contempt, and applies to this Court,

in the exercise of its *appellate* jurisdiction, and before a final judgment, for a writ of *habeas corpus* to summarily review the commitment.

This, I respectfully submit, he cannot do, and neither of the two cases cited in the opinion of the Court sustain its conclusion upon this branch of the case.

*Ex parte* Lange, 18 Wall, 163, was a criminal prosecution. In that case the Court, being *functus officio*, attempted to impose a second and void judgment against the prisoner. He was imprisoned under the void judgment, and this Court released him on *habeas corpus*. It was the petitioner's *only* remedy, because the Court had no general power of review over the judgments of the inferior Courts in criminal cases.

It would have been a reproach upon the law if it had not possessed the power to prevent the man's rotting in jail under a void judgment.

The other case cited is *Ex parte* Rowland, 104 U. S., 604.

There the Circuit Court issued a *mandamus* to certain Commissioners directing them to cause a certain tax to be collected. The Supreme Court held, that, as under the law, it was not the duty of the County Commissioners to do more than to levy the tax, a peremptory *mandamus* to them "to cause the tax to be *collected*" would not lie, and that so much of the command of the writ as attempted to impose that duty upon them, being in excess of the jurisdiction of the Court, was void.

But in that case also the *only* remedy of the petitioners was by *habeas corpus*—they had no other redress.

The amount involved was only $2,040.50, and, although in general a writ of error lies to an order directing a *mandamus* to issue commanding the levy of a tax (Memphis *vs.* Brown, 94 U. S., 715),

yet, as the sum was less than $5,000, no writ of error in that case could be issued under Sec. 691 of the Revised Statutes, and hence no method of review remained.

The case of *Ex parte* Rowland is the first, and only one, so far as I can find, where this Court has released a party charged with contempt by *habeas corpus.*

The doctrine there laid down cannot be extended beyond the facts disclosed in the record without establishing the precedent, heretofore disclaimed by this Court, that it would not convert the writ of *habeas corpus* into a writ of error.

**Second.**—Irrespective of the preceding proposition, I respectfully submit that this Court has reached an erroneous conclusion upon the merits of the main question involved in this application.

The petitioner was ordered by the State Court to present himself for examination before trial under sections of the New York Code heretofore cited. He submitted to a partial examination, and, while such examination was in progress, removed his case to the United States Court.

This Court has now decided that the plaintiff is not entitled to proceed with the examination, and that the defendant escapes from the effects of this order of the State Court by the removal of his case to the United States Court.

The reasoning by which this conclusion was reached is, that the proceeding for the examination of a party before trial, under the New York Code, is in conflict with the laws of the United States (Sec. 861 *et seq.*, R. S. U. S.), and therefore has no force in the Courts of the

United States; that Congress, having legislated on this subject, and prescribed and defined the rule for the government of its own Courts, it is to that extent exclusive of any legislation of the States in the same matter.

I.—I respectfully deny that there is any conflict whatever between the proceedings authorized by the New York Code and the Revised Statutes of the United States.

It is evident, from a perusal of the opinion of the learned Justice in this case, it was assumed, that a deposition of a party to an action taken under the New York Code must, under all circumstances, be used on the trial of the action when it is reached in the Circuit Court. The language of the opinion upon this branch of the case is: "It does not require "much deliberation to see, that if the Acts of Con- "gress forbid the use of this kind of testimony in the "Courts of the United States, no order for taking "it made in the State Court, while the case was "pending in that Court, with a view to its use on a "trial there, can change the law of evidence in the "Federal Court."

But it is not a fact that testimony taken under the Code must be used on the trial of the action.

The examination when taken under the Code "*may* be used in evidence by either party at the "trial of * * * the action" (Sec. 872 N. Y. Code Civ. Proc.), but the party obtaining the examination of the adverse party, if he be dissatisfied with it, for any reason, is not compelled to use the same on the trial.

Neurath *v.* Schmitz, 2 N. Y. Civil Pro. Repts., 400.

McCoon *v.* White, 60 How. Pr. (N. Y.), 149.

Tenney *v.* Mautner, 1 N. Y. Civ. Pro. Repts., 64.

The New York Code provides, *inter alia*, that it is essential for the party to show by affidavit as follows: "The name and residence of the person to "be examined, *and that the testimony of such person* "*is material and necessary for the party making such* "*application, or the prosecution or defence of such* "*action*, and, at the option of the applicant, the "place where he is sojourning, or where he regu- "larly transacts business."

N. Y. Code, Section 872, sub. 4.

Under this section it has been held by the New York Courts:

1st. That a party in an action pending may examine the adverse party under oath before service of the complaint, and for the purpose of ascertaining facts on which to frame a complaint.

Glenney *v.* Stedwell, 64 N. Y., 120.

2d. That such examination may be had where it is shown it may be material and necessary for the party making such application for the prosecution or defence of such action.

Fogg *v.* Fisk, 30 Hun, 61; affirmed, 93 N. Y., 622.

Under Section 34 of the Judiciary Act of 1789, these constructions of the State Statute are binding upon the United States Court.

It is undisputed, therefore, that the manifest object of these provisions of the New York Code was to enable a party to an action to prepare his pleadings, or his evidence by an examination of his opponent previous to the trial, if it was material and necessary for him to do so.

Moreover, neither party to the action is debarred from giving oral testimony by the fact that his de-

position has been taken previous to the trial, and this important element seems to have been overlooked in the opinion of the Court. In New York, as in the United States Courts, the mode of proof in the trial of actions is by oral testimony and the practice of examining parties before trial has not interfered with this latter system.

If the effect of the provisions of the New York Code was to prevent or obstruct the operation, in any way or manner, of Section 861 of the Revised Statutes of the United States, which provides that: "The mode of proof in the trial of actions at com- "mon law shall be by oral testimony and examin- "ation of witnesses in open Court, except as herein- "after provided," there might be some ground for the position that there was a conflict between the State practice and the Statutes of Congress. But no such result follows. The provisions of the Code can be carried out in entire harmony with the letter and spirit of Section 861 of the Revised Statutes of the United States, and of the subsequent sections. The giving of an additional remedy to that already existing certainly does not constitute a conflict between the statutes, and when that remedy merely relates to a course of proceeding before the trial, and does not in any wise impede or interfere with the execution of any Act of Congress, I utterly fail to see how it can be argued that any conflict exists.

At most, the New York Code gives a new remedy to suitors which does not in anywise either affect the trial of the action, the rights of the parties to be examined, the rules of evidence, or the questions of law involved under the issue.

Yet this Court has now gone to the extent of saying that these provisions of the New York Code are in hostility to the acts of Congress regulating the taking of depositions.

Supposing the order of the State Court in this case

had been granted, to enable the plaintiff to frame his complaint (which would be justified by the case of Glenney *v.* Stedwell, 64 N. Y., 120), under the present decision, the order must be set aside; and yet the manifest object of such an order would not be to regulate the mode of proof, but merely to enable the plaintiff to prepare his pleading.

To test this question closely, as to whether there is a conflict between the United States Statutes and the New York Code of Procedure upon the point involved, I now come to examine each section of the Revised Statutes of the United States separately.

Section 861 provides as follows:

"The mode of proof, in the trial of actions at "common law, shall be by oral testimony and ex- "amination of witnesses in open court, except as "hereinafter provided."

Does an examination of a party before trial under the New York Court of Procedure prevent the operation of this section? Does it interfere with the mode of proof in any way? Most certainly not.

Section 863 provides:

"The testimony of any witness may be taken in "any civil cause pending in a District or Circuit Court, "by deposition *de bene esse*, when the witness lives at "a greater distance from the place of trial than one "hundred miles, or is bound on a voyage to sea, or "is about to go out of the United States, or out of "district in which the case is to be tried and to a "greater distance than one hundred miles from the "place of trial, before the time of trial, or when he "is ancient or infirm."

Do the sections of the New York Code of Civil Procedure, appertaining to the examination of witnesses before trial, clash with this section? Do they prevent the examination *de bene esse* of a witness? Most certainly not.

Section 866 provides:

"In any case where it is necessary, in order to "prevent a failure or delay of justice, any of the "Courts of the United States may grant a *dedimus* "*potestatum* to take depositions according to com- "mon usage; and any Circuit Court, upon applica- "tion to it as a Court of Equity, may, according to "the usage of Chancery, direct depositions to be "taken *in perpetuam rei memoriam*, if they relate to "any matter that may be cognizable in any Court "of the United States."

Do the sections of the New York Code of Procedure undertake to prevent the granting of a *dedimus potestatum?* Do they impair or affect the rights given under this or any of the preceding sections? Most certainly not.

In fine, do the sections of the Code of Civil Procedure appertaining to the examination of a party before trial, impair or affect in anywise whatever the rights or the remedies of parties conferred by any section contained in the two chapters of the Revised Statutes XVII. and XVIII, and embracing from Sections 858 to 1042 inclusive? I answer that it cannot be demonstrated.

I respectfully contend, then, that no conflict exists between the two systems, and that the New York Code of Procedure, has merely given a remedy, which did not exist by the Acts of Congress, in a common law action, in regard to the method of procuring and using evidence, in a proceeding in a civil action other than equity or admiralty, and that under the Act of 1872, assimilating the practice of the United States Courts, to that prevailing in the States where the suit has been brought, a suitor is entitled to avail himself of it.

So much for the alleged conflict.

One word now as to the other ground upon which the decision rests, viz.: "We think it may be added

further in the same direction, that if Congress has legislated on this subject and prescribed a definite rule for the government of its own Courts, it is to that extent exclusive of any legislation of the States in the same matter." I have shown, I submit, that Congress has not legislated upon this subject at all. Secs. 861 *et seq.* of the Revised Statutes confine themselves exclusively to three distinct subjects: 1. Mode of proof on the trial; 2. Depositions *de bene esse;* 3. Depositions *dedimus potestatum* and *in perpetuam rei memoriam.* But assuming that legislation can be said to exist in reference to a subject-matter not mentioned in the language of the legislator, or within his thought or intention at the time of the passage of the law, yet the legislator has spoken the second time, and in unmistakable words, in the Act of 1872, having in view the very dissimilarity of the two systems then existing, and said that "the practice, pleadings, and forms of proceeding in civil cases * * * * shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the Courts of Record of the State," etc. If Sections 861 *et seq.* can be regarded as legislation upon the subject in question, the Act of 1872 is unmistakably so. It pointed directly at this "exclusive system" of the United States Courts, and said "henceforth the practice, pleadings, and forms of proceeding shall be in conformity to the State law."

II.—The effect of the decision in this case, I submit, with great respect, is to nullify two Acts of Congress. These Acts of Congress cannot be set aside by mere inference or presumption. They are binding upon the Courts unless they are unconstitutional or are repealed. Section 914 of the Revised Statutes provides that "the practice, pleadings, and form and modes of proceeding in civil cases, other

than equity and admiralty causes, in the Circuit and District Courts, shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the Courts of record of the State within which such Circuit or District Courts are held, any rule of Court to the contrary notwithstanding."

I contend that the language of this Act is perfectly plain and unambiguous, and its manifest object was to assimilate the practice of the United States Courts to the practice prevailing in the State Courts where the actions are pending.

Now, it is admitted in the opinion of the Court, that the case before us "is eminently one of evidence and procedure," and it therefore became mandatory upon the Circuit Judge to give a remedy to a suitor in his Court conferred by the State practice which did not conflict with the United States Statute. There is no discretion upon this point whatever. Sections 861, 862 and 863, regulating the mode of proof on a trial and providing for the taking of depositions *de bene esse* and *dedimus potestatum* were in existence long before the Statute of 1872 was enacted, and if those sections are to be compared with the Act of 1872, under familiar canons of interpretation the latter act must be deemed to have been an amendment or enlargement of the remedies provided by the first-named sections. It cannot be held upon any just principles of interpretation, in the absence of express language, that Acts of Congress passed in 1789 limit the Act of Congress passed in 1872, because it will be presumed by the Court, that Congress, in passing the Act of 1872, had in view, the law already existing in relation to the taking of depositions, as contained in the sections then on the statute book.

This Act of 1872 was passed for the manifest purpose of authorizing the introduction of a different

practice from that which then existed in the Federal Courts. By a single step it changed the common law practice of those Courts.

Aside and apart from an express statute of the United States *forbidding it*, how can a suitor in the Federal Courts be denied a remedy which grows out of the peculiar procedure of the State of New York?

But the argument becomes unanswerable when used with reference to Section 4 of the Removal Act of March 3, 1875, which provides: "That when "any suit shall be removed from a State Court to "the Circuit Court of the United States, * * * *all* "injunctions, *orders* and other proceedings had in "such suit prior to its removal shall remain in full "force and effect until dissolved or modified by the "Court to which such suit shall be removed."

At the time of the removal of this case into the United States Court there was an order in force, for the examination of the defendant before trial, which had been partially executed by an incomplete examination of the defendant.

What does this language mean? That *a"* orders shall remain in full force and effect until dissolved, etc. Its terms are explicit and emphatic, and the unmistakable intention of Congress in passing it was to place a cause in the United States Court in precisely the same condition it was in when removed from the State Court. Congress did not intend that when a suitor availed himself of his right to remove the case into the United States Court that he should thereby gain any advantage over his adversary; he was to exercise the right *cum onere*. Does this language of the Act of 1875 mean anything? It does not say that "*some*" orders shall remain in full force and effect, but "*all*" orders. Then the order for the examination of the defendant before trial remains in full force and effect. This act preserves

everything in a case precisely the same as if no removal were had. Yet, if the decision of this Court stands, the plaintiff is worse off than he was in the State Court—he suffers a disadvantage by force of the removal of his case. This was not intended, and a construction which so holds frustrates the will and purpose of the law.

If any one sat down to write a law giving a suitor, under the circumstances disclosed in this case, the right to examine a party before trial, as provided in the New York Code, it is difficult to see how he could draw a statute which more plainly confers the remedy than the Acts of 1872 and 1875. He would not think of specially repealing or amending the 861st and the following sections of the Revised Statutes, because upon consulting them he would find that they were confined to specific subjects.

In conclusion, the Court leaves undecided the question whether the testimony "actually given under that order and transmitted with the record of the case to the Circuit Court can be used when the trial takes place." If the argument is good in part, it is good in whole, and it is difficult to see, upon the theory of the opinion, how this deposition can be used for any purpose. We have, then, this position of affairs: that the orders of the State Courts in cases removed into the United States Courts do not remain in full force and effect, as the act of Congress reads, but by force of the removal they become vitiated and of no effect!

This effectually demonstrates the unsoundness of the result reached.

JOHN R. DOS PASSOS,
*Of Counsel for Francis A. Fogg.*

113-713

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

# UNITED STATES SUPREME COURT.

IN THE MATTER OF THE APPLICATION

OF

CLINTON B. FISK FOR A WRIT OF HABEAS CORPUS.

# BRIEF FOR PETITIONER.

WHEELER H. PECKHAM,
*Counsel for Petitioner Fisk.*

JNO. R. DOS PASSOS,
*Counsel for Plaintiff.*

C. G. BURGOYNE, "Quick" Print, 146, 148 & 150 CENTRE ST., N. Y.

# UNITED STATES SUPREME COURT.

In the Matter

of

The Application of Clinton B. Fisk for a Writ of Habeas Corpus.

This is a petition for a writ of habeas corpus and certiorari because of imprisonment under an order made by the United States Circuit Courtfor the Southern District of New York adjudging the petitioner guilty of contempt, and ordering the petitioner to be committed because thereof.

## Statement.

One Francis A. Fogg, on the 8th April, 1882, sued the petitioner, General Clinton B. Fisk, in the New York Supreme Court for alleged deceit in selling to the plaintiff certain mining stocks and had defendant held to bail in a large sum.

The order of arrest and the papers on which it was granted are in the record annexed to the petition, pp. 1 to 27, but are not material to any question here raised.

The complaint is in the record, p. 28, *et seq.*

The defendant answered May 11, 1882, p. 40, *et seq.*, thus putting the cause at issue.

The case was noticed for trial by both sides for the term of June, 1882, pp. 48–9.

January 12, 1883, the plaintiff, pursuant to certain New York statutory provisions, obtained an order for the examination of the defendant before trial, p. 50.

The papers on which that order was granted are on p. 51, *et seq.*

The Court denied a motion to set aside that order, p. 62.

That order was affirmed by the General Term and by the Court of Appeals, p. 65, *et seq.*

The defendant obtained an order for a commission to issue to London to examine a witness, pp. 70 to 74.

October 20th, 1883, the examination of the defendant was begun in the State court before Mr. Justice BARRETT, p. 75, *et seq.* Nov. 3, 1883, it was continued before Mr. Justice DONOHUE, p. 78, *et seq.*, to p. 95.

While this examination was pending defendant removed the case to the United States Circuit Court under the Act of 1862, commonly known as the local prejudice act, p. 96, *et seq.*

The plaintiff then made an application to the *U. S. Circuit Court* to continue the examination of the defendant, p. 104, *et seq.*

The motion was granted.

The opinion of Judge WALLACE is on p. 110, *et seq.* The order of *the Court* is on p. 113.

The order required the defendant to appear before John A. Shields, Commissioner, &c., and be examined pursuant to § 870 of the New York Code of Procedure, pp. 114–115.

The defendant appeared before the Commissioner but declined to be examined, and the Commissioner certified the fact to the Judges of the Court, pp. 118–119.

The Court thereupon ordered the defendant to show cause why he should not be punished for contempt, pp. 115–116.

On the hearing of that order the defendant read his own affidavit to the effect that his refusal to answer was under the advice of his counsel, Mr. Evarts and Mr. Peckham, and that while entertaining the greatest respect for the Court he declined solely because he was advised that the Court had no jurisdiction to order his examination and that he could raise the question of jurisdiction in no other way.

His counsel also appended their certificate, pp. 126-7.

On that hearing the Court made an order adjourning the motion to punish for contempt to the next motion day, and further ordered the examination of the defendant before Judge BROWN one of the Judges of the Court, p. 120, *et seq.*

The defendant appeared before Judge BROWN but declined to be examined.

Thereupon the *Court* granted another order for defendant to show cause why he should not be punished for contempt, p. 123, *et seq.*

On the return of this order the Court adjudged the defendant guilty of contempt and committed him to the custody of the marshal until he should pay a fine of five hundred dollars and submit to examination.

On this order the Marshal took the defendant into custody and the defendant thereupon makes this application for a writ of habeas corpus.

It is supposed that much of the proceedings shown in the record attached to the petition is quite irrelevant to any question now submitted to this Court.

It has, however, been made up so as to include everything which the counsel for the plaintiff asked so that pursuant to the practice indicated by decided cases the decision of this Court on the application for the writ might cover the whole case and render any further proceedings unnecessary.

The chapter and sections of the New York Code of Civil Procedure under which it was sought to pursue

this examination are as follows: 1 Bliss, Code 700, chapter "IX, Evidence. * * * Title Depositions, Article First:

*Deposition of a Party, etc.*

"§ 870. The deposition of a party to an action pending in a court of record or of a person who expects to be a party to an action about to be brought in such a court other than a court specified in subdivision sixteenth, seventeenth, eighteenth or nineteenth of section two of this act may be taken at his own instance or at the instance of an adverse party or of a co-plaintiff or co-defendant at any time before the trial as prescribed in this article.

*Deposition of a Witness not a Party.*

"§ 871. The deposition of a person not a party, whose testimony is material and necessary to a party to an action, pending in a court of record, other than a court specified in subdivision sixteenth, seventeenth, eighteenth or nineteenth of section two of this act, or to a person who expects to be a party to an action, about to be brought in such a court, by a person other than the person to be examined, may also be taken, as prescribed in this article.

*Application; Contents of Affidavit.*

"§ 872. The person desiring to take a deposition, as prescribed in this article, may present to a Judge of the Court in which the action is pending, or, if it is pending in the Supreme Court, to a County Judge, or, if an action is not pending, but is expected to be brought, to a Judge of the Supreme Court, or of a Superior City Court, or to a County Judge, an affidavit setting forth as follows:

1. The names and residences of all the parties to the action, and whether or not they have appeared; and if either of them has appeared by attorney, the name and the residence or office address of the attorney; or, if no action is pending, the names and residences of the expected parties thereto.

2. If an action is pending, the nature of the action and the substance of the judgment demanded, and, if the application is made by the defendant before answer, or by either party after answer, the nature of the defense.

3. If no action is pending, the nature of the controversy which is expected to be the subject thereof.

4. The name and residence of the person to be examined, and that the testimony of such person is material and necessary for the party making such application, or the prosecution or defense of such action, and, at the option of the applicant, the place where he is sojourning, or where he regularly transacts business.

5. If an action is pending, that the person to be examined is about to depart from the State; or that he is so sick or infirm as to afford reasonable ground to believe that he will not be able to attend the trial; or that any other special circumstances exist which render it proper that he should be examined as prescribed in this article. But this subdivision does not apply to a case where the person to be examined is a party to the action.

6. If no action is pending, that the person expected to be the adverse party is of full age, and a resident of the State, or sojourning within the State; or that he has an office within the State where he regularly transacts business in person, specifying the place, and, if it is in a city, the street and street number, or other designation of the particular locality; or if two or more persons are expected to be adverse parties, that each is of full age, and so resident or sojourn-

ing, or has such an office; also the circumstances which render it necessary for the protection of the applicant's rights, that the witnesss' testimony should be perpetuated.

7. Any other fact necessary to show that the case comes within one of the last two sections, and if the party sought to be examined is a corporation, the affidavit shall state the name of the officers or directors thereof, or any of them whose testimony is necessary and material, or the books and papers as to the contents of which an examination or inspection is desired, and the order to be made in respect thereto shall direct the examination of such persons and the production of such books and papers."

*Order for Examination.*

"§ 873. The Judge, to whom such an affidavit is presented, must grant an order for the examination, if an action is pending; if no action is pending, he must grant it, if there is reasonable ground to believe that an action will be brought, as stated in the affidavit, and that the application is made in good faith to preserve the expected testimony; otherwise he must dismiss the application. Where the person to be examined is a party to a pending action, or is expected to be a party to an action to be brought, the order may, in the discretion of the Judge, designate and limit the particular matters as to which he shall be examined. The order must require the party or person to be examined to appear before the Judge, or, except where the person to be examined is a party to a pending action, or is expected to be a party to an action to be brought, before a Referee named in the order, for the purpose of taking the examination, at a time and place therein specified. The order must also direct the time of service of a copy thereof; which must be made within the State, not more than twenty, nor less than five days,

before the time fixed for the examination, unless special circumstances making a different time of service necessary are shown in the affidavit, and that fact is recited in the order."

*Punishment for Disobeying Order.*

"§ 874. Witnesses' fees, at the rate prescribed by law in an action in the Supreme Court, must be paid or tendered when the order is served upon the party or other person required to attend. If the party or person so served fails to obey the order, his attendance may be compelled and he may be punished, in like manner, and the proceedings thereon are the same, as if he failed to obey a *subpœna* issued from the Court in which the action is pending, or, if no action is pending, from the Court of which the Judge is a member."

*Service of Order, etc.*

"§ 875. A copy of the order, and of the affidavit upon which it was granted, must be served upon the attorney for each party to the action in like manner as a paper in the action; or, if a party has not appeared in the action, they must be served upon him, as directed by the order. If no action is pending, they must be personally served upon each of the persons named therein as expected adverse parties."

*Deposition, When, Whose and How Taken.*

"§ 876. Upon proof, by affidavit, that service of a copy of the order and of the affidavit has been duly made, as directed in the order, the Judge or the Referee must proceed to take the deposition of the witness, at the time and place specified in the order. He may, from time to time, adjourn the examination to

another day, and to another place, within the same county. Sections eight hundred and fifty-six, eight hundred and fifty-seven, and eight hundred and fifty-eight of this act apply to the examination of a party or a person expected to be an adverse party, taken as prescribed in this article."

*Manner of Taking and Returning Deposition.*

§ 880. The examination of a party, or an expected party, is subject to the same rules as if he was examined upon the trial. The Judge or Referee, upon every other examination taken as prescribed in this article, must insert therein every answer or declaration of the person examined, which either party requires to be inserted. The deposition, when completed, must be carefully read to and subscribed by the person examined; must be certified by the Judge or Referee taking it; and, within ten days thereafter, must be filed in the office of the Clerk; or, if no action is pending, in the office of the Clerk of the County in which it was taken; together with the stipulation or order under which it was taken; the affidavit upon which the order was granted; and proof of the service of a copy of the order and of the affidavit. If, upon an examination before a Referee, the person examined refuses to answer any question, the Referee must report the fact to the Court or Judge, who must determine whether the question is relevant, and whether the witness is bound to answer it.

*When to be Read in Evidence.*

§ 881. The deposition, or a certified copy thereof, may be read in evidence by either party, at the trial of, or upon the assessment of damages, by writ of inquiry, or upon a reference, or otherwise, in, the action specified in the original affidavit or stipulation; or any other action, thereafter brought, between the same

parties, or between any parties claiming under them, or either of them; or, if no action is pending, an action, thereafter brought, between the persons named in the original affidavit as expected parties, or between persons claiming under them or either of them.

*Proof of Witnesses' Inability to Attend.*

"§ 882. But such a deposition, except that of a party, taken at the instance of an adverse party, or a deposition taken in pursuance of a stipulation, as prescribed in this article, shall not be so read in evidence until it has been satisfactorily proved that the witness is dead, or is unable personally to attend by reason of his insanity, sickness, or other infirmity, or that he is confined in a prison or jail; or that he has been and is absent from the State, so that his attendance could not, with reasonable diligence be compelled by subpœna.

*Effect of Deposition.*

§ 883. A deposition, so read in evidence, has the same effect, and no other, as the oral testimony of the witness would have; and an objection to the competency or credibility of the witness; or to the relevancy or substantial competency of a question put to him, or of an answer given by him; may be made, as if the witness was then personally examined, and without being noted upon the deposition."

## POINTS.

**First.** The United States Circuit Court had no jurisdiction to make the order for the continued examination of the defendant.

(*a*) Assuming for the moment that the provisions of the State statute apply to the taking of testimony in the United States Courts those statutes give jurisdiction to make the order to a *Judge* only and not to the Court.

Even the State *Court* has no jurisdiction to make the order or to take the examination.

Hershon vs. Ins. Co., 77 New York, 278.
Lachmeyer vs. Lachmeyer, 26 Hun, 544.
Schumacher vs. Crossman, 12 Weekly Dig., 99.

The New York Court of Appeals in above case says: "This right of examination is strictly statutory. The "Court has no inherent or common law power to order "the examination," p. 279.

In Berdell vs. Berdell, 86 New York, 521, the Court said: "The *power* of the Judge to make an order for the examination of the defendant before trial depends *wholly* upon *the statute*, and as no power is found there to make this order it cannot be sustained."

Still less have the United States Courts wholly the creatures of statute, any such inherent or common law power.

If now, on the other hand, these orders can in any way be construed as Judge's orders (which, being regularly captioned and entered, they cannot) then there is no power in the *Court* to punish for disobedience of a Judge's order.

Sec. 725, U. S. R. S., is the only authority to punish for contempt and is limited to lawful orders of a *Court*.

Nor have the *Judges* or the *Commissioner* any power to administer an oath. Sec. 725 gives such power to the Courts only.

Where the intent is to give the power to the *Judge* as well as to the Court it is done in terms. R. S., § 4973, which applies to District Court Judges acting as such only.

*b*. That the Practice Act of 1872, U. S. R. S., § 914,

does not apply to the taking of testimony is well settled in the United States Courts, and is conceded by Judge WALLACE in his opinion.

Corbett vs. Gibson, 14 Blatchford, 336.
Beardsley vs. Littell, 14 Blatchford, 102.
United States vs. Pings, 4 Fed. Rep., 712.
Randall vs. Venable, 17 Fed. Rep., 165.
Babbitt vs. Telegraph Co., BLATCHFORD, J., unreported, Record p. 111.

That section relates to the "practice pleadings forms and modes of proceeding" and not to testimony.

Section 861 of U. S. R. S. provides for the taking of testimony in the United States Courts. "That it shall be by oral testimony and examination of witnesses in *open Court* except as thereinafter provided. Section 863 *et seq.* provide for examinations *de bene esse*, &c., and are the only provisions qualifying section 861.

The United States statutes have, therefore, affirmatively provided how testimony shall be taken. By Sec. 858, U. S. R. S., provision is made as to the extent to which the State rules shall apply to testimony in the United States Courts.

The section first makes some rules as to the competency of witnesses, and then provides: "In all other respects the laws of the State in which the Court is held shall be the rules of decision as to the *competency* of witnesses in the Courts of the United States in trials at common law and in equity and admiralty."

The inference is necessary that in no other respect than as to the competency of witnesses are the State statutes a rule of decision as to evidence in the Courts of the United States.

Congress having thus fully legislated on the subject of testimony and the manner of taking it, section 914 cannot apply to that subject even were its language sufficiently broad to cover it.

Easton vs. Hodges, 7 Biss., 324.
Parsons vs. Bedford, 3 Peters, 343.

The familiar rule is that where Congress legislates generally on the subject matter such legislation must be followed.

McNutt vs. Bland, 2 How., 17, and cases above cited.

There being then no provision for taking the testimony of the defendant except in open Court, the United States Circuit Court had not the power to order such testimony taken before trial and *a fortiori* was without jurisdiction to punish for contempt for disobeying such order.

**Second.** The removal statute gives to the Court no jurisdiction to make the order for examination.

By reference to the opinion of Judge WALLACE the Court will see that the learned Judge concedes that if this action had been commenced in the Circuit Court, the examination would not be permitted, p. 111.

The Court then relies on the removal act of 1875, as saving to the plaintiff the right to continue the examination, p. 111, 112, fol. 445, and holds that though the testimony thus taken cannot be read in evidence as evidence "it can be as the declaration of a party."

On this we submit the following propositions:

1st. The removal act of 1875 gives no right other than would have existed had the case been commenced in the Circuit Court.

The provision of the Revised Statutes in this respect apply in terms, only to attachments and injunctions (§ 646, Desty., p. 251), and construed with the last paragraph of third subdivision of § 639 (Desty., p. 170), to the effect that a cause when removed must proceed in the same manner as if originally commenced in the Circuit Court, leave no room for a claim that any proceeding of this kind is retained.

The language of § 4 of the Act of March 3d, 1875, is a little broader, but is in *pari-materia*, and the "orders and other proceedings" therein referred to must be limited by the familiar rule "*noscitur à sociis.*" (1 Supplement to R. S., p. 175; 18 Statutes at Large, 470, § 4; Desty., p. 253, § 646*a*.

When the section is construed, as of course it must be, in connection with the latter part of § 3 of said act (1 Sup. R. S., p. 174; 18 Stat. at Large, 470, § 3; Desty., p. 206, § 639*b*, and also with § 6 of said act; 1 Sup. R. S. p. 175; 18 Stat. at Large, 470, § 6; Desty., p. 232, § 639*d*), all to the effect that a removed cause must proceed in the same manner as one originally commenced therein, there would seem as little room for the claim that any proceeding of this kind is retained.

The words "orders and other proceedings" in the Act of 1875 can apply only to such orders as are in the nature of process and as are adapted to the future progress of the case, as if originally commenced in the Circuit Court.

Any other construction would be in direct conflict with the provisions that the action must proceed as if originally commenced in the Circuit Court.

Suppose an order continuing a cause to the next term of the State Court, or setting it down for trial for a day certain!

Such orders clearly would not be removed, because inapplicable to the progress of the case when removed to the Circuit Court.

So this *order* for the examination and *the examination* are not removed because inapplicable to the progress of the cause in the Circuit Court.

2d. The Circuit Court has no power to examine a defendant for the purpose of enabling the plaintiff to prove what he may say as a declaration.

Were it not that this doctrine had been expressed by one so eminent as the Judge of the Circuit Court, I

should regard it as unthinkable. That learned Judge has, however, so held, and we must discuss it.

Attention is called to the sections of the New York Code, *ante*.

They provide for taking testimony which shall have the same effect that oral testimony on the trial would have, and that objections to relevancy or competency shall prevail. § 883. The examination must be before a Judge who must apply the same rules as if the case were on trial, § 873, § 880.

The testimony when taken can be used by *either* party.

Surely an examination for admissions is not the Code proceeding.

If the removal statute removes anything, it must be the thing which existed in the State Court, viz., an examination which, when taken, will be testimony in the cause, and which either party may read in evidence.

*That* proceeding Judge WALLACE holds is not removed.

It would seem necessarily to follow that the Circuit Court had no jurisdiction to direct another proceeding (examining for admissions) authorized neither by United States or State statutes.

On a bill of discovery the answer was evidence for defendant as for plaintiff. Greenleaf on Ev., § 351, and cases cited: but, on this rule of the Circuit Court, we have a Court sitting to take an examination which cannot be evidence in the cause, but which the party can use only by proving as a declaration such part as he likes but which the defendant himself cannot use in any way whatever, and which, if he dies, his representatives cannot offer in evidence.

We submit that a proceeding of this kind is known to the procedure of the Courts, neither of the State nor of the United States, and cannot be supposed to exist in United States Courts in cases only which have been removed from State Courts.

**Third.** This Court has jurisdiction to grant relief on habeas corpus and certiorari.

*Ex parte* Lange, 18 Wallace, 163.
*Ex parte* Parks, 93 U. S., 18.
*Ex parte* Virginia, 100 U. S., 339.
*Ex parte* Siebold, 100 U. S., 371.
*Ex parte* Rowland, 104 U. S., 604.
*Ex parte* Carll, 106 U. S., 522.
*Ex parte* Jom Tong, 108 U. S., 557.

Being certificate of division on a *habeas corpus*, and holding it to be a civil proceeding.

*Ex parte* Clodonio, 110 U. S., 385.
*Ex parte* Crow Dog, 109 U. S., 556.
*Ex parte* Yarbrough, 110 U. S., 652.

In *ex parte* Rowland, 104 U. S., the rule is, perhaps better stated as applicable to this case than in any other of the above cases.

That, like this, was a commitment for contempt in not obeying an order of the Circuit Court in the form of a peremptory mandamus.

The rule is briefly and succintly stated by Mr. Chief Justice WAITE, p. 612:

"If the command of the peremptory writ of manda-
" mus was, in all respects, such as the Circuit Court
" had jurisdiction to make, the proceedings for the con-
" tempt are not reviewable here. But if the command
" was, in whole or in part, beyond the power of the
" Court, the writ, or so much as was in excess of juris-
" diction, was void, and the Court had no right in law
" to punish for any contempt of its unauthorized re-
" quirements. Such is the settled rule of decision in
" this Court."

We submit that the order made by the Circuit Court in this case was as much "beyond its jurisdiction" as if it had directed the parties to determine their controversy by the drawing of lots or the "arbitrament of the sword."

It imposed upon the petitioner a burden and gave to the plaintiff in the suit a privilege authorized by no law, and, if the opinion of the Court below be taken as its judgment, recognized by the system of judicature of no civilized nation under the sun.

**Fourth.** The prayer of the petitioner should be granted.

WHEELER H. PECKHAM,
Of Counsel for Petitioner.

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# United States Supreme Court.

FRANCIS A. FOGG,
*Plaintiff,*

*against*

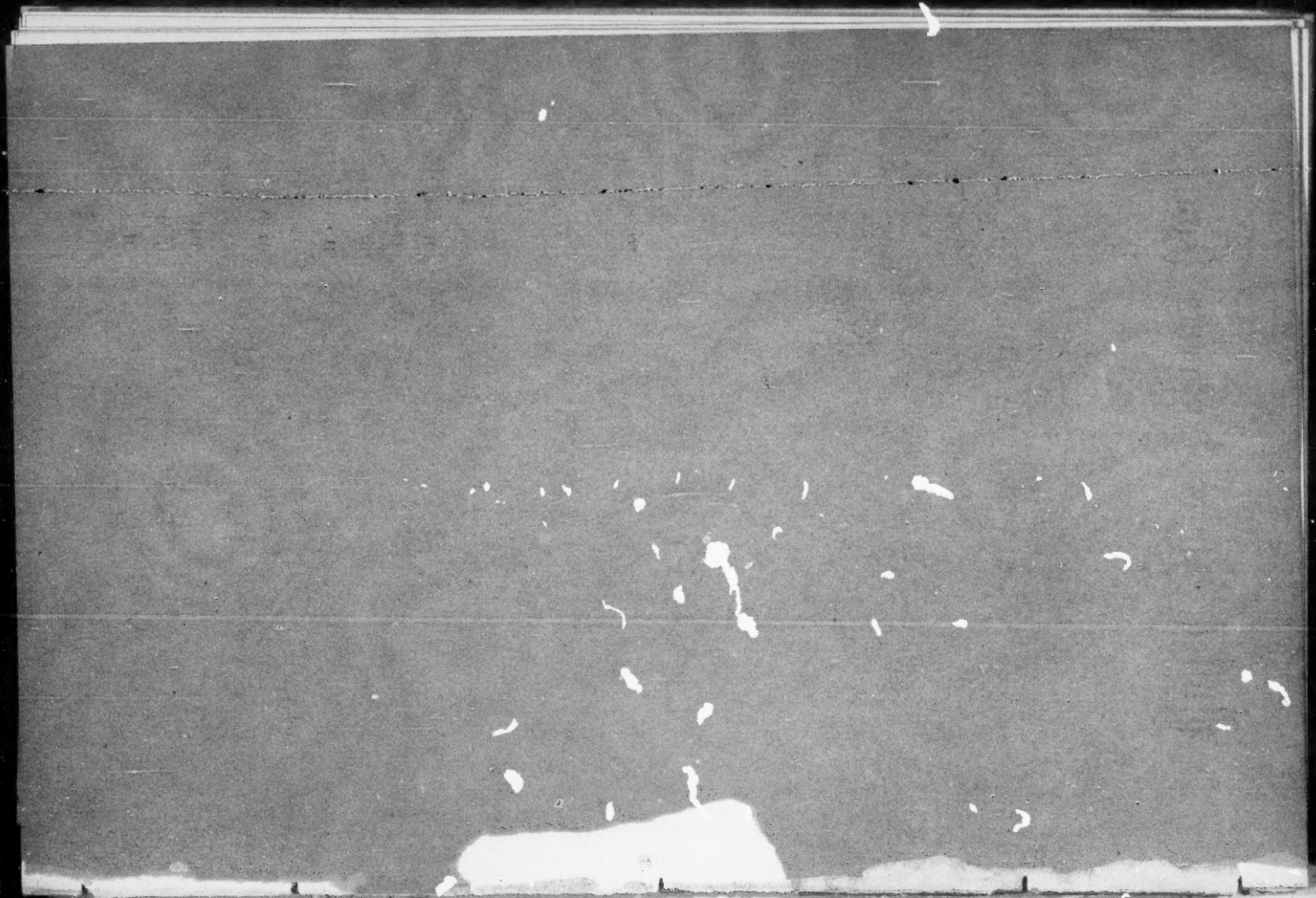
CLINTON B. FISK,
*Defendant.*

# PLAINTIFF'S BRIEF

*On Defendant's Motion for Writ of Habeas Corpus.*

JOHN R. DOS PASSOS,
*Of Counsel for Plaintiff.*

NEW YORK:
DOUGLAS TAYLOR, BOOK AND LAW PRINTER, 89 NASSAU ST., COR. FULTON.
1884.



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PLAINTIFF'S BRIEF ON DEFENDANT'S MOTION FOR WRIT OF HABEAS CORPUS.

## STATEMENT OF FACTS.

This action was originally begun in the Supreme Court of the State of New York on the 8th of April, 1882. It is an action at law in the nature of trespass on the case to recover the sum of $63,250, which was paid to the defendant in the purchase from him of certain mining stocks upon representations of the defendant alleged to be false and fraudulent, and which are fully set forth in the complaint (Record, p. 28). Upon the ground that the defendant had been guilty of fraud and deceit in the premises, the plaintiff, under article 1st, chapter 7, of the New York Code of Civil

Procedure, section 549, sub-division 4, procured an order for the defendant's arrest, contemporaneously with the commencement of the action, in which he was held in $75,000 bail (Rec., p. 1). The defendant appeared in the action and interposed an answer containing general denials of the allegations of the complaint (Rec., p. 40). On the 12th of January, 1883, the plaintiff, pursuant to sections 870 *et seq.* of the Code of Civil Procedure of the State of New York, procured an order from Hon. George C. Barrett, one of the Justices of the Supreme Court, for the examination of the defendant before trial, the substantial part of which is as follows:

"Ordered, that the defendant Clinton B. Fisk be examined and his testimony and deposition taken as a party before trial, pursuant to sections 870, 871, 872, 873, &c., of the Code of Civil Procedure, and that for such purpose he personally be and attend before the undersigned, a Justice of this Court at the Chambers thereof, to be held in the New County Court House, in the said City of New York, on the 31st day of January, 1883, at 11 o'clock in the forenoon of that day." (Rec., p. 49, fol. 196.)

The sections of the New York Code of Civil Procedure under which this order to examine the defendant before trial was made are as follows:

SEC. 870. The deposition of a party to an action pending in a court of record, or of a person who expects to be a party to an action about to be brought in such a court other than a court specified in subdivisions sixteenth, seventeenth, eighteenth or nineteenth of section two of this act, may be taken at his own instance or at the instance of an adverse party, or of a co-plaintiff or co-defendant, at any time before the trial, as prescribed in this article.

SEC. 871. This section provides for taking the deposition of a witness not a party to the action.

SEC. 872. The person desiring to take a deposition, as prescribed in this article, may present to a judge of the court in which the action is pending, or, if it is pending in the supreme court, to a county judge, or, if an action is not pending, but is expected to be brought, to a judge of the supreme court, or of a superior city court, or to a county judge, an affidavit setting forth as follows:

1. The names and residences of all the parties to the action, and whether or not they have appeared; and, if either of them has appeared by attorney, the name and the residence or office address of the attorney; or, if no action is pending, the names and residences of the expected parties thereto.

2. If an action is pending, the nature of the action and the substance of the judgment demanded, and, if the application is made by the defendant before answer, or by either party after answer, the nature of the defence.

3. If no action is pending, the nature of the controversy, which is expected to be the subject thereof.

4. The name and residence of the person to be examined, and that the testimony of such person is material and necessary for the party making such application, or the prosecution or defence of such action, and, at the option of the applicant, the place where he is sojourning, or where he regularly transacts business.

5. If an action is pending, that the person to be examined is about to depart from the State, or that he is so sick or infirm as to afford reasonable ground to believe that he will not be able to attend the trial; or that any other special circumstances exist which render it proper that he should be examined as prescribed in this article. But this subdivision does not apply to a case where the person to be examined is a party to the action.

6. If no action is pending, that the person expected to be the adverse party is of full age, and a resident of the State, or sojourning within the State; or that he has an office within the State where he regularly transacts business in person, specifying the place, and, if it is in a city, the street and street number, or other designation of the particular locality; or, if two or more persons are expected to be adverse parties, that each is of full age, and so resident, or sojourning, or has such an office; also the circumstances which render it necessary for the protection of the applicant's rights, that the witness's testimony should be perpetuated.

7. Any other fact necessary to show that the case comes within one of the last two sections, and if the party sought to be examined

is a corporation, the affidavit shall state the name of the officers or directors thereof, or any of them whose testimony is necessary and material, or the books and papers as to the contents of which an examination or inspection is desired, and the order to be made in respect thereto shall direct the examination of such persons and the production of such books and papers.

SEC. 873. The judge, to whom such an affidavit is presented, must grant an order for the examination if an action is pending; if no action is pending he must grant it, if there is reasonable ground to believe that an action will be brought, as stated in the affidavit, and that the application is made in good faith to preserve the expected testimony; otherwise he must dismiss the application. Where the person to be examined is a party to a pending action, or is expected to be a party to an action to be brought, the order may, in the discretion of the judge, designate and limit the particular matters as to which he shall be examined. The order must require the party or person to be examined to appear before the judge, or, except where the person to be examined is a party to a pending action, or is expected to be a party to an action to be brought before a referee named in the order, for the purpose of taking the examination, at a time and place therein specified. The order must also direct the time of service of a copy thereof, which must be made within the State, not more than twenty, nor less than five days, before the time fixed for the examination, unless special circumstances making a different time of service necessary are shown in the affidavit, and that fact is recited in the order.

This section was amended May 29, 1884, by omitting the words "except where the person to be examined is a party to a pending action, or is expected to be a party to an action to be brought," so that the examination of a party may now be held before a referee.

SEC. 874. Witnesses' fees, at the rate prescribed by law in an action in the Supreme Court, must be paid or tendered when the order is served upon the party, or other person required to attend. If the party or person so served fails to obey the order his attendance may be compelled, and he may be punished in like manner, and the proceedings thereon are the same as if he failed to obey a subpœna issued from the court in which the action is pending, or,

if no action is pending, from the court of which the judge is a member.

SEC. 875. A copy of the order, and of the affidavit upon which it was granted, must be served upon the attorney for each party to the action, in like manner as a paper in the action; or if a party has not appeared in the action they must be served upon him, as directed by the order. If no action is pending, they must be personally served upon each of the persons named therein as expected adverse parties.

SEC. 876. Upon proof, by affidavits that service of a copy of the order and of the affidavit has been duly made, as directed in the order, the judge or the referee must proceed to take the deposition of the witness, at the time and place specified in the order. He may, from time to time, adjourn the examination to another day, and to another place, within the same county. Sections eight hundred and fifty-six, eight hundred and fifty-seven, and eight hundred and fifty-eight of this act apply to the examination of a party or a person expected to be an adverse party, taken as prescribed in this article.

SEC. 877 has no relevancy to the examination of a party before trial.

S. C. 878 was stricken out in 1877.

SEC. 879. The parties to an action may stipulate in writing that the deposition of a competent witness, to be used therein, may be taken before a judge or referee, at a time and place specified in the stipulation, either orally or upon interrogatories to be agreed upon in like manner. The witness may be subpœnaed to attend the examination as upon a trial, and the judge or referee may take his deposition, as if an order had been made by the court directing it to be so taken. But this section does not apply to a case specified in section eight hundred and seventy-seven of this act.

SEC. 880. The examination of a party, or an expected party, is subject to the same rules as if he was examined upon the trial. The judge or referee, upon every other examination taken as prescribed in this article, must insert therein every answer or declaration of the person examined which either party requires to be inserted. The deposition, when completed, must be carefully read to and subscribed by the person examined; must be certified by the judge or referee taking it; and within ten days thereafter, must be filed in the office of the clerk; or if no action is pending, in the office of the clerk of the county in which it was taken; together with the stipulation or order under which it was taken, the affidavit upon which

the order was granted; and proof of the service of a copy of the order and of the affidavit. If, upon an examination before a referee, the person examined refuses to answer any question, the referee must report the fact to the court or judge, who must determine whether the question is relevant, and whether the witness is bound to answer it.

SEC. 881. The deposition, or a certified copy thereof, may be read in evidence by either party at the trial of, or upon the assessment of damages, by writ of inquiry, or upon a reference, or otherwise, in the action specified in the original affidavit or stipulation; or any other action thereafter brought between the same parties, or between any parties claiming under them, or either of them; or if no action is pending, an action thereafter brought between the persons named in the original affidavit as expected parties, or between persons claiming under them or either of them.

SEC. 882. But such a deposition, except that of a party taken at the instance of an adverse party, or a deposition taken in pursuance of a stipulation, as prescribed in this article, shall not be so read in evidence until it has been satisfactorily proved that the witness is dead, or is unable personally to attend by reason of his insanity, sickness or other infirmity, or that he is confined in a prison or jail; or that he has been and is absent from the State, so that his attendance could not, with reasonable diligence, be compelled by subpœna.

SEC. 883. A deposition, so read in evidence, has the same effect, and no other, as the oral testimony of the witness would have; and an objection to the competency or credibility of the witness, or to the relevancy or substantial competency of a question put to him, or of an answer given by him, may be made, as if the witness was then personally examined and without being noted upon the deposition.

SEC. 884. The original affidavits filed with such a deposition, or certified copies thereof, are presumptive evidence of the facts therein contained, to show a compliance with the provisions of this articles.

SEC 885. relates to the taking of a deposition to be used on a motion.

SEC. 886. Where a person to be examined, as prescribed in this article, is a resident of the State, he shall not be required to attend in any county, other than that in which he resides or where he has an office for the regular transaction of business, in person. Where he is not a resident, he shall not be required to attend in any other county than that wherein he is served with a subpœna, unless for special reasons, stated in the affidavit, the order otherwise directs.

The affidavit upon which the order for defendant's examination was granted is found at page 51 *et seq.* of Record.

The defendant, after the service of the order upon him, for his examination, made a motion to vacate it, which motion, coming on to be heard at a Special Term of the Court, held on the 20th of February, 1883, was denied, and the defendant was directed to attend on the 27th of February, 1883, at 10.30 in the forenoon for the purposes of said examination (Rec., p. 62). From this last-named order the defendant appealed to the General Term of the Supreme Court (Rec., p. 64). The General Term affirmed the order. The opinion of the Court is found in 30 Hun, 61. From the decision of the General Term the defendant took the case to the Court of Appeals, which tribunal, on the 9th day of October, 1883, affirmed the decision of the Special and General Terms, in refusing to vacate the order (Rec., p. 67).

On the 20th of October, 1883, the defendant with his counsel appeared before Hon. George C. Barrett, one of the Justices of the Supreme Court, and was duly sworn on his examination before trial. Upon objection being made to certain questions, the matter was submitted to the Court, and the case adjourned until November 3, 1883, at which time, the questions being disallowed, the examination again proceeded. Further objections being interposed, the examination was again postponed until a decision could be had upon the questions. On November 7, 1883, the defendant again

submitted to a lengthy examination, and the case was again adjourned until November 17, 1883, for the purposes of continuing the examination, and of enabling certain books to be produced (Rec., pp. 75 to 96 inclusive).

In the interim, however, on the 13th of November, 1883, the defendant presented his petition and affidavit, together with a bond, and procured an order from the Supreme Court removing the case into the Circuit Court of the United States for the Southern District of New York, under the Local Prejudice Act of 1867, alleging that from prejudice or local influence he was not able to obtain justice in the State Court.

On the 17th of December, 1883, the plaintiff made a motion in the Circuit Court for an order, directing that the examination of the said defendant, pursuant to the order made in the action on the 12th day of January, 1883, in the State Court, be continued, and taken in the Circuit Court (Rec., pp. 104 to 110 inclusive).

After a full argument the Circuit Judge, Hon. William J. Wallace, made an order, granting the plaintiff's motion, and continuing the examination and deposition of the defendant, pursuant to the previous order of the State Court, and ordered the defendant to appear on the 21st of February, 1884, before John A. Shields, Commissioner of the Circuit Court, as Master, on the day named, and on such other days as might be designated, to be examined, and his testimony and deposition taken, and continued as a party before trial, pursuant to section 870 *et seq.* of the Code of Civil

Procedure of the State of New York (Rec., pp. 110 to 115 inclusive).

On the day named the defendant failed to appear personally, but his counsel appeared and asked for an adjournment of said examination, which was granted by the master, who required the defendant to appear on the 25th of February, 1884, at 10.30 (Rec., p. 117). On the 25th of February the defendant appeared with his counsel and claimed that he could not be examined without the administration of an oath, if he could be examined at all, whereupon the plaintiff requested the Commissioner to administer the oath to the defendant, which the defendant declined to take, and declined to be sworn, and declined to answer any questions whatever (Rec., p. 118); which facts being certified to the Court by the Master (Rec., p. 119), on the 3rd of March, 1884, another order was made requiring the defendant to appear before the Circuit Judge, or one of the Judges of the Court at a stated Term thereof to be held at the United States Court, and Post Office Building, Room 47, in the City of New York, on the 7th day of March, 1884, at 11 o'clock, in the forenoon of that day, and show cause why the defendant should not be punished for contempt of Court in refusing to be sworn before the Master, and in refusing to answer certain questions asked defendant upon said examination (Rec., pp. 115, 116).

On the 7th day of March, 1884, the defendant appeared in Court accompanied by his counsel. After hearing counsel for both parties the motion to punish

the defendant for contempt was ordered adjourned to March 28, 1884; and there being a question raised as to whether the defendant could be examined before a Master or Referee under the provisions of the Code of Civil Procedure of the State of New York, as they then existed, it was further ordered that the defendant attend before the Honorable Addison Brown, one of the Judges of the Court at a stated Term on the 14th of March, 1884, at 11 o'clock, in the forenoon of that day and on such other days as might be designated, to be examined for the purposes mentioned in the previous orders of January 12, 1883, and February 15, 1884, made in this action (Rec., p. 121).

The defendant's examination was adjourned from time to time until the 24th of March, 1884, when he appeared in person with his counsel, before Judge Brown, but, under the advice of counsel, refused to be sworn or to answer any questions, which facts were certified to by the Judge (Rec., pp. 122, 123).

On the 25th day of March, 1884, Hon. William J. Wallace, Circuit Judge, made an order requiring the defendant to appear before him or one of the Judges of the Court at a stated term thereof on the 28th day of March, 1884, at 11 o'clock in the forenoon, and show cause why he should not be punished for contempt of Court in refusing to be sworn before said Judge, and in refusing to answer questions asked defendant, and more particularly specified in the certificate of the Hon. Addison Brown (Rec., p. 125).

Upon the return of this last-named order the de-

fendant submitted an affidavit, accompanied by a certificate of his counsel, to the effect that the Court had no jurisdiction to make the order for the examination of the defendant (Rec., pp. 126, 127); whereupon, after consideration, the Circuit Court, on the 19th of April, 1884, made an order adjudging the defendant guilty of contempt, and that he forthwith pay to the Clerk of the Court the sum of five hundred dollars as fine for contempt, and that defendant be taken into custody by the United States Marshal of the Southern District of New York, and be committed until said fine should be paid, and until the defendant should consent to submit to an examination and to answer all proper questions put to him by counsel upon the examination referred to and directed in said orders of February 15th, 1884, and March 7th, 1884 (Rec., pp. 128, 129).

Under this order of April 19, 1884, the defendant stands committed.

## POINTS.

There are two questions involved :

FIRST—WHETHER THE WRIT OF HABEAS CORPUS CAN BE ISSUED TO REVIEW THE PROCEEDINGS OF THE CIRCUIT COURT ?

SECOND—IF SO, WHETHER THE CIRCUIT COURT HAD JURISDICTION TO CONTINUE THE ORDER OF THE STATE COURT REQUIRING THE DEFENDANT TO SUBMIT TO AN EXAMINATION AS A PARTY BEFORE TRIAL.

FIRST—Whether the writ of *habeas corpus* can be issued to review the proceedings of the Circuit Court ?

(*a.*) It is undisputed that the Circuit Court had jurisdiction over the person and subject-matter of the action, and that the case was properly removed from the State Court into the United States Court under the Local Prejudice Act of March 2, 1867 (Sec. 639 R. S. U. S., sudivision 3).

Nor can there be any question as to the general power of the Circuit Court to punish for contempt of Court. By section 725 of the Revised Statutes it is provided—

"that the said Courts shall have power to * * * punish by fine or imprisonment, at the discretion of the Court,

contempts of their authority; provided that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice * * * and the disobedience or resistance by any such officer or by any party, juror, witness or other person *to any lawful writ*, process, order, rule, decree, or command of the said Courts."

In *ex parte* Kearney, 7 Wheaton, 39, the Court, per Story, *J.*, says:

"When a Court commits a party for a contempt, their adjudication is a conviction, and their commitment, in consequence, is execution; and so the law was settled upon full deliberation in the case of Brass Crosby, Lord Mayor of London, 3 Wilson, 188."

This doctrine was followed in the case of New Orleans *v.* Steamship Company, 20 Wall., 387, where the Court said:

"The fine of $300 imposed upon the mayor is beyond our jurisdiction. Contempt of court is a specific criminal offense. The imposition of a fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. This Court can take cognizance of a criminal case only upon a certificate of division in opinion."

In the case of Hayes *v.* Fischer, 102 U. S., 121, the party against whom proceedings in contempt had been instituted, and which resulted in his being ordered to pay to the clerk a certain sum as a fine and to stand committed until the order was obeyed, sought to review the proceed-

ings by writ of error. In that case the Court used this language:

"If the proceeding below, being for contempt, was independent of and separate from the original suit, it cannot be re-examined here either by writ of error or appeal. This was decided more than fifty years ago in *ex parte* Kearney (7 Wheat., 38), and the rule then established was followed as late as New Orleans *v.* Steamship Company, 20 Wall., 387."

"It follows that we have no jurisdiction."

In Williamson's case, 26 Penn. St., p. 24, the District Court of the United States had committed the petitioner for contempt in refusing to make return to a writ of *habeas corpus*. He applied to the Supreme Court of the State of Pennsylvania for a writ of *habeas corpus*, claiming that the Court which committed him for contempt had no jurisdiction. The Supreme Court, per Black, *J.*, stated the position of the petitioner in this language:

"But the counsel of the petitioner go behind the proceedings in which he was convicted, and argue that the sentence for contempt is void, because the Court had no jurisdiction of a certain other matter, which it was investigating, or attempting to investigate, when the contempt was committed. We find a judgment against him in one case; and he complains about another in which there is no judgment. * * * It must be remembered that contempt of Court is a specific criminal offense. It is punished sometimes by indictment, and sometimes in a summary proceeding, as it was in this case. In either mode of trial the adjudication against the offender is a conviction, and the commitment in consequence is execution (7 Wheaton, 38). * * * It is most especially necessary that

convictions for contempt in one court should be final, conclusive, and free from re-examination by other Courts on *habeas corpus*. If the law were not so our judicial system would break to pieces in a month. Courts totally unconnected with each other would be coming in constant collision. * * * I will content myself by simply referring to some of the books in which it is established that the conviction for contempt is a separate proceeding, and is conclusive of every fact which might have been urged on the trial for contempt, and among others want of jurisdiction to try the cause in which the contempt was committed" —citing cases. "These cases will speak for themselves, but I may remark as to the last one (14 Ad. & Ellis, 558) that the very same objection was made there and here. The party was convicted of contempt in not obeying a decree. He claimed his discharge on *habeas corpus* because the chancellor had no jurisdiction to make the decree, being interested in the cause himself. But the Court of Queen's Bench held that if that was a defense it should have been made on the trial for contempt, and the conviction was conclusive. We cannot choose but hold the same rule here. Any other would be a violation of the law which is established and sustained by all authority and all reason."

(*b.*) We now come to apply these principles to the present motion.

In the progress of this suit the Circuit Court made an order continuing an order of State Court that the defendant should submit to an examination before trial, and the object of the writ of *habeas corpus* in this case is ~~was~~ to seek to review this order of the Circuit Court. If the Court had refused the motion of the plaintiff to compel the defendant to submit to this examination, it is undoubtedly settled that no writ of error or appeal would lie

to the Supreme Court of the United States. Can the defendant review by *habeas corpus* questions which the plaintiff could not review by writ of error or appeal? That seems to be a practical statement of this controversy.

This writ is applied for as an exercise of the appellate jurisdiction of this Court, and if this attempt to review is successful, it practically adds another class of cases in which appeals may be taken to this Court from the *orders and interlocutory* judgments of Circuit Courts.

The proceeding to examine the petitioner under the Code of New York as a party before trial, is purely one of practice. It is a right emanating from the Code of Civil Procedure. Now, the petitioner's rights cannot be seriously or substantially affected by his submission to the examination provided for by the order of the State Court. If his deposition, when completed, is offered and received in evidence upon the trial of the cause, his remedy is by objection and exception, which can be reviewed by this Court upon writ of error, and the whole question can then be examined (R. S., Sec. 691; Sawin *vs.* Kenny, 93 U. S., 289). Or it may be raised upon a certificate of division under Sec. 652 of the Revised Statutes.

It is settled in this Court that it will not review by *habeas corpus* questions which can be

properly heard on appeal or by writ of error. (Hayes *vs.* Fischer, 102 U. S., 121.)

In the case of *ex parte* Parks (93 U. S. 18) the petitioner applied to this Court for a writ of *habeas corpus*, alleging that he had been convicted of forgery in the District Court of the United States for the Western District of Virginia, and was in custody by virtue of such commitment. He claimed that his conviction was illegal, by reason that the act for which he was convicted was not a crime against the laws of the United States.

The application for the writ was denied, upon the ground that whether an act charged in an indictment is or is not a crime by the law which the Court administers, is a question the District Court was competent to decide, and that such decision would not be reviewed by *habeas corpus*. The learned Judge who delivered the opinion in that case concluded by saying:

"In the case before us, the District Court had plenary jurisdiction both of the person, the place, the cause, and everything about it. To review the decision of that Court by means of the writ of *habeas corpus* would be to convert that writ into a mere writ of error, and to assume an appellate power which has never been conferred upon this Court."

The case of *ex parte* Rowland (104 U. S., 604) seems to be the only case in which the Supreme Court has reviewed, by writ of *habeas corpus*, proceedings of the Circuit Court com-

mitting a party for contempt. In that case the Circuit Court issued a mandamus to certain County Commissioners directing them to cause a certain tax to be collected. The Supreme Court held that as under the law it was not the duty of the County Commissioners to do more than levy the tax that a mandamus to them "to cause the tax to be collected" would not lie, and that so much of the command of the writ as attempted to impose that duty upon them, being in excess of the jurisdiction of the Court, was void. The Supreme Court, per Chief Justice Waite, said :

> "If the command of the peremptory writ of mandamsu was in all respects such as the Circuit Court had jurisdiction to make, the proceedings for the contempt are not reviewable here. But if the command was in whole or in part beyond the power of the Court, the writ, or so much as was in excess of jurisdiction, was void, and the Court had no right in law to punish for any contempt of its unauthorized requirements. Such is the settled rule of decision in this Court."

Citing, *ex parte* Lange, 18 Wall., 163; *ex parte* Parks, 93 U. S., 18; *ex parte* Siebold, 100 *id.*, 371; *ex parte* Virginia, *id.*, 339.

None of the cases cited by the learned Chief Justice were commitments for contempt. In the case of Lange (18 Wall., 163) the Court held that the Court below was *functus officio* at the time it undertook to impose a sentence upon the petitioner. In *ex parte* Parks (93

U. S., 18), the writ was refused by this Court on the ground that it would not review the question by *habeas corpus*, whether an act charged in an indictment is or is not a crime by the law which the Court administers, but that that question belonged to the Court in which the indictment was pending. In the case of *ex parte* Virginia, the question was whether an act under which the petitioner was indicted was constitutional; and while the Court held that it would review such a question on *habeas corpus*, it decided that the act was constitutional and denied the writ. In *ex parte* Siebold (100 U. S., 371), substantially the same question was presented as in *ex parte* Virginia, and the Court held that it would review by *habeas corpus* the question whether Acts of Congress, under which indictments were found against the petitioner, were constitutional.

(*c.*) Finally, upon this question, the facts show that the defendant deliberately placed himself in contempt for the purpose of raising the question as to the power of the Court to commit for contempt (Rec., pp. 118, 127). This matter had been fully argued before the learned Circuit Judge who had passed upon the question adversely to the petitioner. The case as it stands, therefore, seems to be but a device to, review by

this summary proceeding, the action of the Court below.

SECOND.—The Circuit Court had jurisdiction to make the order in question requiring the defendant to submit to an examination as a party before trial,

This power can be upheld under two distinct statutes: 1st, the Act of June, 1872, section 914, R. S., which provides that "the *practice*, pleadings, *and forms and modes of proceeding* in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, *as near as may be*, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the Courts of Record of the State within which such Circuit or District Courts are held, any rule of Court to the contrary notwithstanding;" or 2d, under the Act of March 3, 1875, section 4, which provides, "that when any suit shall be removed from a State Court to the Circuit Court of the United States * * * *all* injunctions, *orders* and *other proceedings* had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the Court to which such suit shall be removed."

(*a.*) *First.*—Under the practice Act of 1872.

By subdivision 4 of section 872 of the New York Code, which is pertinent to the present inquiry, it is provided that, upon an affidavit containing the necessary facts, either party to an action may obtain an order for the examination of the adverse party before trial. The affidavit shall contain "the name and residence of the person to be examined, and *that the testimony of such person is material and necessary for the party making such application, or the prosecution or defense of such action.*

Under the construction given to this act by the Courts of New York, there are two classes of cases in which an examination of a party before trial will be allowed: 1st, for the purpose of enabling a plaintiff to frame a complaint (Glenny *v.* Stedwell, 64 N. Y., 120) where such examination is material and necessary for the party making such application; 2d, or, for the prosecution or defense of the action (Fogg *vs.* Fisk, 30 Hun, 61, Affd. 93 N. Y., 652).

The examinations provided for in these sections are a substitute for the former bill of discovery, which has been abrogated in the State of New York by section 1914 of the Code of Civil Procedure, which provides that—

"An action cannot be maintained, to obtain a discovery under oath, in aid of the prosecution or defence of another action."

These examinations furnish a prompt, easy and inexpensive remedy in place of that which existed previous to the adoption of the Code by a bill of discovery. [See Glenney *v.* Stedwell *et al.*, 64 N. Y., 120, where the history and object of the examination of parties under the Code is given by Judge Folger.]

The examination when taken under these sections "*may* be used in evidence by either party at the trial of * * * the action." But the party obtaining the examination of the adverse party, if he be dissatisfied with it for any reason, is not compelled to use the same on the trial. As was said in the case of Neurath v. Schmitz, 2 N. Y. Civil Procedure Reports, 400:

> "It is not necessary that defendants should swear that they intend to use the deposition on the trial as has been required in some reported cases. Under the Code the deposition becomes evidence for both parties, and either may read it on the trial. Defendants may change their minds after hearing what plaintiff swears to, and may not wish to put her statements in evidence."

To the same effect is McCoon *v.* White, 60 How. Pr. (N. Y.), 149; Tenney *v.* Mautner, 1 Civ. Proc. Rep., 64; and the same doctrine is laid down on p. 113, note of this volume, where it is said:

> "Where the party testifies adversely to the party calling him, he is not obliged to use the examination, and has by this means learned in advance that to have called his adversary at the trial would have been to make him his wit-

ness upon adverse testimony, and to avoid its consequences, refrains from so calling him."

The manifest objects of these provisions is to enable a party to fully prepare himself for trial, either by obtaining testimony from his adversary to prove his own case, or advising himself as to the evidence which the defendant expects to rely on to sustain his defence, and while the Courts of New York have refused to allow examination of parties which were inquisitorial in their nature, they have regarded this remedy as a very efficacious one in tending in some cases to avoid, and in others to hasten or shorten, a trial.

We thus find a practice prevailing in the State of New York which is in no wise in conflict with the Statutes of the United States. Section 861 of the Revised Statutes provides :

" *The mode of proof in the trial of actions* at common law shall be by oral testimony and examination of witnesses *in open Court*, except as hereinafter provided.

The language of this section in no wise conflicts with or interferes with the practice which prevails in the examination of a party before trial, because the manifest object of section 861 is to provide for *the mode of proof on the trial of an action*, that is during the trial, upon the trial, at the trial, and it does not refer to or exclude the examination of parties before trial as contemplated by the New York Statutes, for

although a party has been examined, he is not precluded from appearing on the trial and being sworn as a witness either in his own behalf, or in behalf of the person at whose instance he has been examined. But, irrespective of this view, the remedy provided by the New York Code of Procedure may exist cumulatively with the examination defined in section 861 of the Revised Statutes.

This view is supported by the opinion of Mr. Justice Miller (Flint *vs.* Board of Commissioners of Crawford County, 5 Dillon, 481), where it was held that in common law actions in the Federal Courts depositions may be taken pursuant to the State law or Act of Congress, as parties may elect. The motion in that case was to suppress a deposition. The Court said:

> "Since the notice and certificate in this case conform to the provisions of the State Statute, I hold that the depositions may be read in evidence. Such has been the practice, so far as I know, in the Circuit from the earliest period. Prior to the Act of 1872 (Rev. Stat., sec. 914) it is probable that the practice may have rested upon rules of Court adopting the State regulations as to taking and certifying depositions; but that act is broad enough to sanction the practice where the local regulations do not conflict with any special provision of the Acts of Congress on the subject."

To same effect Warren *et als. vs.* Younger, 18 Fed. Rep., p. 859; Bryant *vs.* Leland, 6 Fed. Rep., 125.

The objects to be attained by the examination of a party before trial under the Code are entirely different from those contemplated by the Revised Statutes. As we have shown, the examination before trial does not conflict with, abridge, impair or destroy the oral examination at the trial.

(*b.*) Second.—Under the Act of March 3, 1875, sec. 4, which provides:

> "That when any suit shall be removed from a State Court to the Circuit Court of the United States. * * * *all* injunctions, *orders* and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the Court to which such suit shall be removed."

We respectfully submit that the argument of the Circuit Judge upon this branch of the case is unanswerable:

> "By force of this provision, the plaintiff is entitled to proceed with the defendant's examination, unless for some substantial reason the revisory power of this Court should be exercised to deprive him of the benefit of the order he has obtained and the proceeding he has instituted. It lies with the defendant, therefore, to present some controlling reason to the judicial discretion for denying to the plaintiff the right which he had secured and of which he could not be deprived, except by a removal of the suit. That both parties have deemed this proceeding an important one is obvious from the tenacity with which the right to pursue it has been contested. It appears by the record and moving papers that the defendant has been defeated in efforts to vacate the order for his examination by the Supreme Court at Special Term and at General Term, and

by the Court of Appeals, and that, although for a period of eighteen months, he was willing to submit his rights to the State Courts, he invoked the jurisdiction of this Court when there was no other resource left by which he could escape an examination. Certainly, there are no equities which should induce this Court to deprive the plaintiff of the fruits of his long struggle. If the examination of the defendant could subserve no useful *purpose to the plaintiff*, undoubtedly the defendant should not be subjected to it, or be put to the annoyance or inconvenience which it might entail upon him. But, although the defendant's testimony, when obtained, may not be of service to the plaintiff, to the full extent it would be in the State Courts, it may, nevertheless, be of some value. If it cannot be used on the trial of this action as a substitute for the oral examination of the defendant, *it can be as the declaration of a party*, and it can also be used in other suits in the Courts of this State between the same parties or their privies, pursuant to sec. 881 of the Code. There seems to be no reason, therefore, for dissolving or modifying the order of the State Court, or for denying to the plaintiff the benefit of the proceeding which was pending when the defendant removed the suit."

The cases which support the above view are numerous.

The rule was laid down by this Court in 1879 in the case of Duncan *v.* Gegan, 101 U. S., 810, as follows:

"The transfer of the suit from the State Court to the Circuit Court did not vacate what had been done in the State Court previous to the removal. The Circuit Court, when a transfer is effected, takes the case in the condition it was when the State Court was deprived of its jurisdiction. The Circuit Court has no more power over what was done before the removal than the State Court would have had if the suit had remained there. It takes the case up where the State Court left it off."

This principle had been previously adopted by the Circuit Courts with singular unanimity ;

A'-erly *vs.* Vilas, 3 Biss., 32 ;

Williams *vs.* Raynor, 7 Biss., 245 ;

Bills *vs.* New Orleans, St. Louis & Chicago Railroad Co., 13 Blatch., 227 ;

and it has since been uniformly followed.

Werthein *vs.* Continental Railway and Trust Co., 20 Blatch., 508 ; where the Court said :

"If the State Court has made an order, and thereafter the case is removed, it goes into the Circuit Court with the order, if unexecuted, to be executed, and if executed, to remain a valid order."

Milligan *vs.* The Lalance & Grosjean M'fg. Co., 21 Blatch., 407.

Smith *vs.* Schroed, 11 The Reporter, 730.

Harrison Wire Co. *vs.* Wheeler, 11 Fed. Rep., 206.

Sonstiby *vs.* Keeley, 11 Fed. Rep., 578.

In fact we have not met a solitary instance where a case has been removed from the State to the Federal Courts in which orders made previous to its removal have not been carried out and maintained.

In the present case the defendant having exhausted in vain all of the Courts of the State in his efforts to evade the order for his examination, at the last moment, as a dernier resort, seeks refuge in the sanctuary of a Federal Court, where he claims the orders of the State Court cannot

follow him, and where he is at last freed from an examination which may compel him to expose his own misconduct.

If a suitor can gain this advantage by removing a cause into the Federal Court, it would seem to be in the teeth of the spirit and words of the Statute which says that "*all injunctions, orders and other proceedings* had in such suit prior to its removal shall remain in full force and effect."

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